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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. **79-1103**

THE MENOMINEE TRIBE OF INDIANS, *et al.*,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioners, the Menominee Tribe of Indians, *et al.*, respectfully petition the Court to issue a writ of certiorari to review the judgment order and opinion of the United States Court of Claims in the "Basic Liability Decision," Docket 134-67, involving damages arising out of the termination of the Menominee Indian Tribe.

OPINION BELOW

On July 19, 1978, the Trial Judge issued a decision recommending that the United States be found liable for damages arising out of the unjustified termination of the Menominee Indian Tribe. The Court of Claims, in its opinion of October 17, 1979, reported at 221 Ct. Cl. ___, 607 F.2d 1335 (1979), reversed, holding that it had no jurisdiction to hear non-constitutional congressional breach of trust claims. The opinion of the Court of Claims is reprinted as Appendix A and the opinion of the Trial Judge as Appendix B.

JURISDICTION

The judgment of the Court of Claims was entered on October 17, 1979, and this petition for a writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1255(1) (1976).

QUESTION PRESENTED

Whether the Court of Claims has jurisdiction over claims for money damages arising out of a breach by Congress of the United States government's treaty obligations and fiduciary duties to the Menominee Indian Tribe; or

Whether the Court of Claims, which clearly has jurisdiction over a claim for money damages against the United States pursuant to 28 U.S.C. §§ 1491, 1505 (1976), based on a breach of the government's treaty obligations and fiduciary duties to the Menominee Indian Tribe, loses that jurisdiction where Congress rather than the Secretary of the Interior is responsible for the actions constituting the breach.

AUTHORITIES INVOLVED

Indian Claims Commission Act, Pub. L. No. 79-726, § 24, 60 Stat. 1049 (1946) (current version at 28 U.S.C. § 1505 (1976)). A copy of section 24 of the original Act is reprinted as Appendix C.

The Tucker Act, 28 U.S.C. § 1491 (1976), reprinted as Appendix D.

The Menominee Termination Act, 25 U.S.C.A. §§ 891-902 (1963) (repealed by Pub. L. No. 93-197, 87 Stat. 770 (1973), 25 U.S.C. § 903 (1976)). A copy of the Termination Act is reprinted as Appendix E.

Treaty of Wolf River of May 12, 1854, 10 Stat 1064 (1854), reprinted as Appendix F.

STATEMENT OF CASE

BACKGROUND

The Menominee Indian Reservation was established in 1854 by the Treaty of Wolf River. 10 Stat. 1064 (1854); *Menominee Tribe v. United States*, 391 U.S. 404, 405 (1968). Pursuant to the Treaty, fee title to the approximately 276,480-acre Reservation was held by the United States in trust for the benefit of the Menominees "for a home, to be held as Indian lands are held." The land was about 95 percent forested, unallotted, and was managed by the federal government as a commercial forest.

In 1953, after the Menominees had occupied their Reservation for almost a century, Congress, by concurrent resolution, directed the Secretary of Interior to recommend legislation to withdraw federal supervision over certain Indian tribes. H.R. Con. Res. 108 (Senate concurring), 83d Cong., 1st Sess., 67 Stat. B132 (1953). The Menominees were among the tribes listed in this

resolution. Congress' intent in passing this resolution was to reduce government expenses associated with the Bureau of Indian Affairs (Trial Judge Opinion, App. B at 24a-25a; Fdgs. of Fact 13-14, App. B at 61a-62a and to get the United States "out of the Indian business." Trial Judge Opinion, App. B at 24a-28a, 52a; Fdg. of Fact 108, App. B at 122a.

Approximately one year later, Congress passed the Menominee Termination Act, 68 Stat. 250 (1954), *as amended*, 25 U.S.C.A. §§ 891-902 (1963) (repealed by Pub. L. No. 93-197, 87 Stat. 770 (1973), 25 U.S.C. § 903 (1976)). The Menominees were singled out for an early termination by Senator Watkins, Chairman of the Indian Subcommittee of the Senate Committee on Interior and Insular Affairs, who believed that the Menominees should be the first to be terminated, since they had recently won an $8.5 million judgment against the United States in the Court of Claims, and because superficially they seemed more acculturated than they in fact were. Fdg. of Fact 51, App. B at 80a-81a.

The stated purpose of the Menominee Termination Act was "to provide for orderly termination of Federal supervision over the property and members" of the Tribe. 25 U.S.C.A. § 891 (1963). But the Tribe itself was made responsible for creating a plan to take over the United States government's obligation to manage tribal property and provide services to the Indian community. The Secretary of Interior's role was limited to approving or disapproving the plan. The Act, as amended, required that on or before April 30, 1961, the Secretary transfer all real and personal property held in trust for the Tribe to a tribal corporation, or if none existed, to a trustee chosen by the Secretary. The Act also provided that after the transfer of title to the Tribe, all federal supervision was to cease:

> [I]ndividual members of the tribe shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians, [and] all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, ... (25 U.S.C.A. § 899 (1963).)

Although the Menominees opposed termination and sought to have the Act repealed, the Tribe attempted to develop a plan for the management of its resources. Trial Judge Opinion, App. B at 29a, 34a-42a; Fdgs. of Fact 41, 43-49, App. B at 78a-80a. After being forced to accept various restrictions imposed by the federal government and the State of Wisconsin, the Menominees submitted a plan which called for the creation of a Wisconsin state corporation to hold the property of the Tribe, manage the forest and sawmill operations, and provide some of the services previously provided by the federal government. Trial Judge Opinion, App. B at 31a-33a, 39a-43a; Fdgs. of Fact 27-34, 55-68, App. B at 66a-71a, 83a-91a. Menominee County was created by the State of Wisconsin to encompass the lands formerly a part of the Reservation.

The Menominees, unsuccessful in preventing termination and believing that their termination had been poorly conceived, badly implemented, and forced upon them despite the better judgment of almost everyone involved,[1] brought suit in the Court of Claims to recover

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[1] Congress, 12 years after terminating the Menominee Tribe, recognized that termination was wrong and harmful to the Menominees, that it was "ill conceived," that the Tribe was coerced into accepting termination, that it had been a bitter failure causing much harm and damage to the Tribe, and reversed termination by restoring federal jurisdiction over the Menominee Tribe and its assets. Menominee Restoration Act, 87 Stat. 770 (1973),

[footnote continued]

damages for the losses incurred as a result of the termination process and the government's violations of its fiduciary obligations to the Menominees.

THE PROCEEDINGS IN THIS CASE

Plaintiffs filed this action in the Court of Claims on April 25, 1967. Trial commenced December 1, 1971, on nine claims, three on the issue of both liability and damages, and six on the question of liability only.[2] The remaining claim, Mismanagement of Tribal Funds, was severed for later trial. The Trial Judge, on July 19, 1978, issued his first recommended decision, in which he held that the Termination Act, as enacted and implemented, constituted "an abrogation of defendant's fiduciary obligation growing out of its treaty and trust relationship." Trial Judge Opinion, App. B at 54a. He found that the United States had a fiduciary obligation to the Menominee Indians, and that it breached this duty by terminating them under circumstances which showed

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25 U.S.C. § 903 (1976). Congressman Haley described the Termination Act as "one of the unfortunate moves that the Congress made." 119 *Cong. Rec.* 34301-02 (1973). Congressman Saylor, speaking in favor of the Restoration Act, stated:

> The bill before us, H.R. 10717, is not a panacea nor a permanent solution to the problems of the Menominee Tribe of Indians, *nor does it undo the human suffering and economic damage imposed on these people over the past 20 years.* It is not a perfect bill, Mr. Speaker, but it is a better bill than the monstrosity that was rammed through this House in 1954 as part of the mistaken "termination policy" of those times. (119 *Cong. Rec.* 34302 (1973), emphasis added.)

See also S. Rep. No. 581 (Menominee Restoration Act), 93d Cong., 1st Sess. 3-4 (1973); Trial Judge Opinion, App. B at 50a n.42; Fdgs. of Fact 92-94, App. B at 109a-110a.

[2]The claims are described in the opinions of the Court of Claims (*Menominee Tribe v. United States*, 607 F.2d 1335, 1338 n.2; App. A at 3a n.2) and the Trial Judge (App. B at 21a n.2).

that the Tribe was ill-prepared for termination and would suffer serious losses if it took place. Trial Judge Opinion, App. B at 53a-54a. He felt the United States also breached its obligations as a trustee by failing to assist the Menominees in preparing for the problems that would inevitably occur, and by refusing to reconsider either the policy or the specific mechanisms of termination. Trial Judge Opinion, App. B at 53a.[3]

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[3]Trial Judge Spector made the following ultimate findings (Fdgs. of Fact 108-15, App. B at 122a-124a):

> 108. The Menominee Termination Act was initiated by the United States, in the interests of the United States. It was not in the best interests of the Menominees as a tribe nor as individual Indians that the federal trusteeship be terminated. Termination policy was initiated by the United States in order to "get out of the Indian business" and to reduce costs, specifically within the Bureau of Indian Affairs.
>
> 109. The Menominee Tribe and its members did not effectively consent to termination of federal supervision and trusteeship over the tribe, its members, and its assets.
>
> 110. Termination was not warranted under any of the four criteria established by Acting Commissioner of Indian Affairs Zimmerman. Defendant failed to apply the criteria which it enunciated. Adequate studies were not made and had they been made in advance, they would have demonstrated that the Menominee did not meet those criteria for termination.
>
> 111. Following passage of the Termination Act of 1954, defendant failed to adequately assist the Menominees to prepare for final termination which became effective in 1961.
>
> 112. During the period 1954-1961 it became apparent that the Menominees were not prepared for termination and that the tribe and its assets would suffer harmful consequences if a termination policy was implemented. There was, nevertheless, no reappraisal of the policy of termination.
>
> 113. The Menominees were not trained to assume the extensive responsibilities imposed upon them by involuntary termination. They were not trained in self-government, nor

[footnote continued]

The Court of Claims, sitting *en banc*, reversed, and, without reaching the merits of the issue, *sua sponte* concluded that it lacked jurisdiction to hear a claim "that a statute passed by Congress, though valid and constitutional, is nevertheless a breach of trust owed by the Federal Government to the Indians." *Menominee Tribe v. United States,* 607 F.2d 1335, 1339 (1979), App. A at 5a. The court suggested two bases for this conclusion. First, it argued that there was no jurisdiction under either sections 1491 or 1505 because the claim was not "founded" upon the Constitution or an act of Congress. 607 F.2d at 1341, App. A at 9a. The court specifically rejected the notion that the Termination Act could be used as a foundation for jurisdiction, as this was the alleged breach of plaintiffs' pre-existing rights rather than the source of such rights. *Id.* Although the court admitted that the Menominee treaties and resultant trust relationship could logically be considered an "express or implied contract with the United States," it declined to do so in this case because of the "general history of consents-to-sue in this Court." 607 F.2d at 1341-42,

to assume supervisory management or sub-management positions with respect to the Menominee Forest or sawmill operations.

114. If termination was to be imposed on the Menominee Tribe, it required a period of from one to two generations (20-40 years), of phased withdrawal from federal supervision, to effect the transition without serious damage to the tribe.

115. Failure of the defendant to prepare the tribe for termination, and the imposition of termination without the necessary preparation, constituted an abrogation of defendant's fiduciary obligations growing out of its treaty and trust relationship to the Menominee Tribe and its members. Defendant's acts and omissions constitute breach of a fiduciary duty owned to plaintiffs.

App. A at 9a. The court gave the same cursory conclusion for that provision of section 1491 providing jurisdiction for "liquidated or unliquidated damages in cases not sounding in tort."[4] Its treatment of section 1505 jurisdiction was equally brief; the court noted only that that section had been construed to cover all of the grounds of section 1491. 607 F.2d at 1342, App. A at 9a. Although section 1505 specifically provides jurisdiction for claims "arising under . . . treaties of the United States," the Court of Claims concluded that this language "is neither unambiguous nor exact. . . ." 607 F.2d at 1342, App. A at 10a.

The second major basis for the court's decision was its belief that "Congress has the unilateral and plenary power (to the extent that there is no violation of the Constitution, including the Just Compensation Clause) to abrogate or modify, by statute, a prior treaty with Indians." *Id.* In light of that principle, the court found it "hard to believe" that by using the words "treaties" and "express or implied contract," Congress intended the Indians to be able to receive monetary damages when a valid, constitutional statute constituted a breach of the United States' fiduciary duty. 607 F.2d at 1342, App. A at 11a. The court, apparently, did not find it "hard to believe" that Congress intended the payment of money

[4] 607 F.2d at 1342, App. A at 9a. The court's sole support for this conclusion was *United States v. King,* 395 U.S. 1 (1969), which held only that the Court of Claims does not have jurisdiction to issue declaratory judgments. This is of no relevance to the instant case, where the Menominees are suing for money damages. As the Court of Claims stated in *Mitchell v. United States,* 219 Ct. Cl. ___, 591 F.2d 1300, 1302 n.10, *cert. granted,* 99 S.Ct. 2880 (1979), it does have jurisdiction to hear monetary claims based on equitable principles. Plaintiffs' case here falls directly into that category.

damages when a valid constitutional statute constitutes a Fifth Amendment taking, but did so when the same kind of damages resulted from a breach of fiduciary obligations arising under a congressionally ratified treaty.

Although the court, in analyzing whether or not it had jurisdiction to consider the Menominees' claim, focused exclusively on the enactment of the Termination Act, its ruling was considerably broader, and plaintiffs' claims were dismissed to the extent that they were based on (1) any evaluation of congressional motives or interests; (2) any failure of Congress to prepare or assist the Tribe in termination, make full disclosure of pertinent facts or evaluate whether the Tribe could handle termination; and (3) any duress or pressure by Congress on the Menominees to obtain their consent to termination. 607 F.2d at 1344-45, App. A at 14a. The court further held that with respect to the Department of the Interior, the United States cannot be held liable for its action unless the Secretary violated either the Constitution or a specific congressional directive. 607 F.2d at 1345, App. A at 15a. The court cited no authority or rationale whatsoever for this proposition.

The net impact of the Court of Claims' decision is to eliminate the Indians' right to recover money damages for violation of sacred treaty and statutory obligations, and to restrict recovery to only two circumstances: where a Fifth Amendment taking occurs, and where a federal official (not Congress) violates a specific treaty or statute. 607 F.2d at 1344, App. A at 13a. If this holding by the Court of Claims is to stand, its unfairness to all Indian tribes across the country (let alone its frustration of the congressional intent in enacting the Indian Claims Commission Act) becomes obvious.

REASONS FOR GRANTING THE WRIT

I.

THE ISSUE IN THIS CASE IS ONE OF SIGNIFICANT IMPORT UNDER THE CONSTITUTION, LAWS AND TREATIES OF THE UNITED STATES

The issue in this case is important because it deals with the jurisdiction conferred by Congress upon the Court of Claims and directly affects the accountability of the United States to Indian tribes resulting from treaties and statutes. The decision of the Court of Claims results from the erroneous interpretation of the purpose and scope of section 24 of the Indian Claims Commission Act as well as the major principles of Indian trust law. If allowed to stand, it will severely limit the ability of Indians to hold the United States accountable for its mismanagement of Indian property and affairs.

Section 24 of the Indian Claims Commission Act was expressly enacted to allow future Indian claims to be litigated without the necessity of special jurisdictional acts.

> Moreover, in order to prevent any future accumulation of unsettled claims, the statutory prohibition against litigation in the Court of Claims growing out of agreements with Indian tribes would be lifted and the Indian would henceforth have the same right as his white or black neighbor to secure a full and free hearing in the Court of Claims, or any other appropriate tribunal, *on any controversy with the Federal Government that may arise in the future.* Once Indian tribes are given the same right as any non-Indian to bring suit on grievances that may arise in the future, there would be no need to accord

any special treatment to such Indian claims as may subsequently arise.[5] (Emphasis added.)

If the decision below is allowed to stand, Indian tribes will be forced to go back to Congress to seek special jurisdictional acts for claims based upon a breach of the government's treaty obligations and fiduciary responsibilities to Indian Tribes where Congress, rather than an agent of the government, is responsible for the actions constituting the breach. This is contrary to the legislative intent of the Act.

The court's decision also negates any reason for, as well as the specific language of, section 24. If Congress had merely wanted to include Indian tribes in the class of persons eligible to sue under section 1491, it could have simply amended that section to so state. Instead, Congress enacted a new provision specifically giving the Court of Claims jurisdiction to hear the types of claims included in section 1491 as well as those unique to Indians, arising under their treaties with the United States.

The Court of Claims' decision will also alter the major principles of Indian trust law by severely limiting the ability of the tribes to make the United States accountable for mismanagement of Indian affairs. Unless Indians are able to recover monetary damages for breach of trust claims, they will be left remediless in all cases where their property rights have been damaged by actions of the United States save those which meet the narrow criteria of a Fifth Amendment taking. As the Court of Claims so aptly realized in *Mitchell v. United States*, 219 Ct. Cl.

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[5]H.R. Rep. No. 1466 (Creating an Indian Claims Commission), 79th Cong., 1st Sess. 3 (1945). *See also* Memorandum for the Commissioner of Indian Affairs by Acting Solicitor Felix Cohen, April 22, 1946, reprinted as App. G; 92 *Cong. Rec.* 5313 (1946) (Statement of Congressman Jackson, Chairman of House Indian Affairs Committee).

___, ___, 591 F.2d 1300, 1302, *cert. granted*, 99 S.Ct. 2880 (1979),

> It is inconceivable . . . that Indian allotment-patentees whose lands were wholly wasted by the Government could not recover compensation in this court for such a violation of fiduciary obligation.

If there is no remedy in the Court of Claims, there is in effect no real redress. *Id.* Without such redress, there is no incentive for the United States to carry out its fiduciary obligations to Indians in a prudent fashion. The Department of Interior recognized this, and told Congress that it did not want to be in a position where it could mishandle Indian funds and property without being held accountable. 92 *Cong. Rec.* 5312 (1946) (Statement of Congressman Jackson). The same rationale applies equally to all parts of the government which deal with Indian affairs, including Congress.

If the court's decision below is allowed to stand, then the fiduciary obligations of the United States government to the Indians, embodied in treaties and previously protected by the courts, will be eliminated. Such elimination could be accomplished merely by having the Congress, rather than the Executive Branch, take the initiative in breaching the pertinent fiduciary obligations. It is hard to conceive that Congress intended such an outrageous result when it enacted the Indian Claims Commission Act. This would all be in direct violation of section 24 of the Indian Claims Commission Act, which provides:

> *Provided, however,* That nothing contained in this section shall be construed as altering the fiduciary or other relations between the United States and the several Indian tribes, bands, or groups. (60 Stat. 1055-56.)[6]

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[6]Appendix C at 125a. This proviso was deleted upon recodification, as unnecessary, since a provision conferring jurisdiction

[footnote continued]

By refraining from exercising jurisdiction over breach of trust claims, the Court of Claims is fundamentally altering that relationship.

II.

THIS DECISION CONFLICTS WITH PRIOR DECISIONS OF BOTH THIS COURT AND THE COURT OF CLAIMS

The Court of Claims' decision that neither the Menominee treaties, statutes, nor the Termination Act itself constitute a basis for jurisdiction is directly contrary to its holding in *Menominee Tribe v. United States,* 179 Ct. Cl. 496, 388 F.2d 998 (1967), *aff'd,* 391 U.S. 404 (1968), a case also involving a claim of monetary damages for rights lost through termination.[7] In that case, the court specifically characterized the case as one arising "under the Treaty of 1854 . . . and the Termination Act," and held that it had jurisdiction under sections 1505 and 1491. 179 Ct. Cl. at 501, 388 F.2d at 1001. In the present case, however, the court comes to the opposite conclusion, and holds that neither the treaties nor the Termination Act serves as a basis for jurisdiction.

Similarly, in its recent decision in *Mitchell v. United States,* 219 Ct. Cl. ___, 591 F.2d 1300, *cert. granted,* 99 S.Ct. 2880 (1979), the Court of Claims stated:

> Our continued acceptance of Indian claims for breach of trust—*where the existence of the trust obligation is founded on a statute, treaty,* executive order or regulation, or an agreement—comports fully with the expectation of Congress that what is now 28 U.S.C. section 1505 (first enacted in 1946

cannot in any way alter the relationship of the federal government with the Indians. 28 U.S.C.A. § 1505 (1965), Reviser's Note.

[7]The specific rights involved in that case, the Menominees' hunting and fishing rights, are not involved in the present litigation.

> as section 24 of the Indian Claims Commission Act, 60 Stat. 1055) would cover the post-1946 "legal" claims (*i.e.,* other than purely "moral" claims) of Indian entities , . . . (219 Ct. Cl. at ___, 591 F.2d at 1303; emphasis added.)

Although the trust obligation before the court in *Mitchell* was based on the General Allotment Act, 25 U.S.C. §§ 331 *et seq.* (1976), the Court of Claims acknowledged that it would have jurisdiction to hear breach of trust claims founded upon a fiduciary relationship established by treaty. 219 Ct. Cl. at ___, 591 F.2d at 1303.

The court's conclusion that it has no authority to consider non-constitutional breach of trust cases arising out of the enactment of a valid, constitutional statute also is contradicted by its own previous decisions. In *Confederated Salish and Kootenai Tribes v. United States,* 167 Ct. Cl. 405 (1964) & 175 Ct. Cl. 451, *cert. denied,* 385 U.S. 921 (1966), the Court of Claims held that Congress, in enacting a law requiring the Indians to pay the surveying costs of opening up the Reservation when the treaty with the Indians required the government to pay such costs, breached its fiduciary duty to the Tribes. The court accepted jurisdiction but specifically rejected plaintiffs' claim for interest on the award on the grounds that Congress' action did not result in a Fifth Amendment taking.[8] 175 Ct. Cl. at 454-55. Similarly, in *Navajo Tribe v. United States,* 193 Ct. Cl. 1095 (1971), the court considered, on the merits, whether Congress breached its fiduciary duty to the Navajos by enacting legislation which would authorize the States of Utah and

[8]The court also characterized Congress' action in this case as a breach of an agreement or contract, in which the agreement or contract was the treaty between the United States and the Confederated Salish and Kootenai Tribes. 175 Ct. Cl. at 455.

New Mexico to impose taxes on the royalty interest received from leasing tribal lands. Thus, the Court of Claims' determination in the instant case, that its jurisdiction does not encompass claims that a valid, constitutional statute may be a breach of trust, contradicts its prior decisions.

The Court of Claims' decision also violates fundamental tenets of Indian law previously laid down by this Court. As the court below recognized, Congress has plenary power over Indian affairs and may legislate in any manner which it deems best benefits the needs of the Indians. *Menominee Tribe v. United States,* 607 F.2d 1335, 1342 (1979), App. A at 10a, *citing Lone Wolf v. Hitchcock,* 187 U.S. 553 (1903); *see Cherokee Nation v. Hitchcock,* 187 U.S. 294 (1902). That power, however, is subject to two types of limitations. The Court of Claims recognized one of these limitations—Congress must pay just compensation pursuant to the Fifth Amendment when, acting in its sovereign capacity, it appropriates Indian property for its own use. 607 F.2d at 1342, App. A at 10a. *See also Choate v. Trapp,* 224 U.S. 665, 678 (1912); *Yankton Sioux Tribe v. United States,* 272 U.S. 351 (1926); *Shoshone Tribe v. United States,* 299 U.S. 476 (1937); *United States v. Klamath and Moadoc Tribes,* 304 U.S. 119 (1938); *Alcea Band of Tillamooks v. United States,* 329 U.S. 40 (1946).

But the court failed to recognize that there exist other limitations placed upon Congress when it purportedly acts pursuant to its constitutional power to regulate Indian affairs. These limitations derive both from the Constitution and from the guardianship role of the United States. In *United States v. Creek Nation,* 295 U.S. 103, 109-10 (1935), this Court said:

> The tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the control and management of that government. But this power to control and manage was not absolute. *While extending to all appropriate measures for protecting and advancing the tribe, it was subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions.* (Emphasis added.)

See also Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73 (1977); *Three Affiliated Tribes of the Fort Berthold Reservation v. United States,* 182 Ct. Cl. 543, 390 F.2d 686 (1968).

The Department of the Interior has recognized that Congress' plenary power over Indian affairs is subject to these limitations inherent in a guardianship. In a November 21, 1978, letter to Assistant Attorney General James W. Moorman, the Department's Solicitor stated:

> But the power of Congress to implement the trust obligation would not seem to authorize enactments which are manifestly contrary to the Indians best interest. This does not mean that Congress could never pass a statute contrary to its determination that the Indians' best interests are served by it. Congress in its exercise of other powers such as eminent domain, war, or commerce, may act in a manner inimicable to Indians. However, where Congress is exercising its authority over Indians, rather than some other distinctive power, the trust obligation would appear to require that its statutes be based on a determination that the protection of Indians will be served. Otherwise, a statute would not be rationally related to the trusteeship obligation to Indians.

Contrary to the Court of Claims' assertion, the mere fact that Congress is purportedly acting in furtherance of its fiduciary duty to benefit the Indians does not defeat liability, when such actions are in fact detrimental to the best interests of the tribe.

Nor does the fact that Congress is acting pursuant to its power over Indians immunize its actions from judicial review. *Sioux Nation v. United States,* 220 Ct. Cl. ___, 601 F.2d 1157, *cert. granted,* 48 U.S.L.W. 3383 (1979); *Choctaw Nation v. Atchison, Topeka & Santa Fe RR,* 396 F.2d 578 (10th Cir. 1968). In *Delaware Tribal Business Comm. v. Weeks,* 430 U.S. 73, 84 (1977), this Court said:

> The statement in *Lone Wolf* that the power of Congress "has always been deemed a political one, not subject to be controlled by the judicial department of the government," however pertinent to the question then before the Court of congressional power to abrogate treaties, has not deterred this Court, particularly in this day, from scrutinizing Indian legislation to determine whether it violates the equal protection component of the Fifth Amendment. (Citations eliminated.)

The Court of Claims previously has recognized this fact, having scrutinized legislation enacted pursuant to Congress' power over Indian affairs. *Menominee Tribe v. United States,* 179 Ct. Cl. 496, 388 F.2d 998 (1967), *aff'd,* 391 U.S. 404 (1968); *Confederated Salish and Kootenai Tribes v. United States,* 167 Ct. Cl. 405 (1964) & 175 Ct. Cl. 451, *cert. denied,* 385 U.S. 921 (1966); *Navajo Tribe v. United States,* 193 Ct. Cl. 1095 (1971).

The standard of review employed by this Court in analyzing Indian legislation is whether the statute is "tied rationally to the fulfillment of Congress' unique

obligation toward the Indians." *Delaware Tribal Business Comm. v. Weeks,* 430 U.S. 73, 85 (1977). *See also Morton v. Mancari,* 417 U.S. 535, 555 (1974). The Menominee Termination Act was not rationally tied to Congress' obligation toward the Indians, but was in direct violation of it. That an act of Congress itself may be a breach of trust has been recognized. *Confederated Salish and Kootenai Tribes v. United States,* 167 Ct. Cl. 405 (1964) & 175 Ct. Cl. 451, *cert. denied,* 385 U.S. 921 (1966); *Fort Peck Indians of the Fort Peck Reservation v. United States,* 34 Ind. Cl. Comm. 24, 48-49 (1974), *rev'd and remanded in part on other grounds,* 207 Ct. Cl. 1045 (1975). That Congress, when terminating a tribe, does not divest itself of its fiduciary duty, but rather assumes the burden both of insuring that the Indians are ready for termination and of carrying out the process in such a manner that protects the tribe, has also been recognized. *Klamath and Modoc Tribes v. United States,* 193 Ct. Cl. 670, 688-89, 436 F.2d 1008, 1017, *cert. denied sub nom. Anderson v. United States,* 404 U.S. 950 (1971); *Creek Nation v. United States,* 24 Ind. Cl. Comm. 238, 250 (1970), *aff'd* 216 Ct. Cl. ___, 578 F.2d 1389, *cert. denied* 439 U.S. 859 (1978); *Ottawa Tribe v. United States,* 8 Ind. Cl. Comm. 831, 883-84 (1960), *rev'd in part on other grounds,* 166 Ct. Cl. 373 (1964).

III.

THE WRIT SHOULD ISSUE IN LIGHT OF THIS COURT'S DUTY TO EXERCISE SUPERVISION OVER THE LOWER FEDERAL COURTS

The Court of Claims indicated in its decision that the question of whether it had jurisdiction to hear non-constitutional breach of trust claims was one of first impression. 607 F.2d at 1340, App. A at 7a. Notwithstanding this fact, the court felt justified to decide the

issue without benefit of reasoned input from either party. The question of jurisdiction has never been briefed by the parties at any time throughout the long history of this litigation, and was first raised by the court, *sua sponte*, at oral argument. A decision of such import to both parties as well as tc the state of the law should not have been made in such a cavalier fashion. At the very least, after 13 years of litigation, the Menominees should be allowed to present their arguments on jurisdiction to at least one tribunal before their case is dismissed.[9] This is particularly true for those portions of the court's decision which go beyond its analysis and are not supported by either case law or reason.

This Court has previously granted a writ of certiorari to review issues of first impression important to the administration of Indian affairs, *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 42 (1946), and should do so again in this case in light of the importance of this issue to the continued management by the United States of Indian affairs and property.

CONCLUSION

The Court of Claims assumed, without deciding, that the Trial Judge was correct in finding a fiduciary duty between the United States and the Menominee Indian Tribe and that the United States violated its fiduciary obligations to the Menominees. Prior holdings of this Court, the Courts of Appeal, and the Court of Claims construe that fiduciary duty as requiring that the laws enacted by Congress, pursuant to its plenary power over Indian affairs, be consistent with its guardianship

[9]Not all of the Menominees' claims are dismissed under the Court of Claims' decision, as some of them are based on Fifth Amendment takings.

obligations. If Congress enacts legislation which is contrary to that obligation and causes monetary loss to the tribe, then the Indians' only remedy is in the Court of Claims. By holding that it has no jurisdiction to consider this type of breach of trust claim, the Court of Claims deprives the Indians of their only forum for relief. This defeats the purpose of section 1505, and will once again make it necessary for Indians to appeal to Congress to obtain special jurisdictional acts for the redress of their grievances. It also fundamentally alters the trust relationship between the United States and the Indians by allowing Congress to ride roughshod over its historic agreements with the Indians. Such a result is neither desirable nor compelled by either the language of sections 1491 and 1505 or the history of Indian claims.

If Congress passed a statute the result of which abrogated a contract, express or implied, between the United States and a non-Indian, the Court of Claims would have no problem finding it had jurisdiction to hear a resulting claim for money damages pursuant to 28 U.S.C. § 1491.[10] How then, can the Court of Claims distinguish this from a statute affecting Indians that abrogates and violates treaties and statutes with those Indians? A violation of a trust obligation to an Indian tribe was certainly intended to be covered by Congress under section 24 of the Indian Claims Commission Act (28 U.S.C. § 1505), irrespective of the branch of government involved.

[10]*See, e.g., Smithmeyer v. United States*, 25 Ct. Cl. 481 (1890), 147 U.S. 342 (1893), in which this Court held that the Court of Claims had jurisdiction, under its general jurisdictional grant, to award monetary damages arising out of an act of Congress which rescinded petitioner's contract for the design of the congressional library.

It should be noted that this Court has recognized that important issues arise when federal supervision of Indian tribes is terminated, and has granted a writ of certiorari to review those issues. *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 141 (1972).

For the foregoing reasons, the writ of certiorari should issue. Petitioners also suggest that this may be an appropriate case for this Court to summarily reverse the Court of Claims' decision.

Respectfully submitted,

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APPENDIX

APPENDIX A

In the United States Court of Claims

No. 134-67 (Basic)

(Decided October 17, 1979)

THE MENOMINEE TRIBE OF INDIANS, ET AL. v. THE UNITED STATES

Angelo A. Iadarola, attorney of record, for plaintiffs. *Frances L. Horn, Jerry C. Straus, Robin A. Friedman*, and *Wilkinson, Cragun & Barker*, of counsel.

Glen R. Goodsell, with whom was *Assistant Attorney General James W. Moorman*, for defendant. *Richard L. Beal*, of counsel.

Before FRIEDMAN, *Chief Judge*, COWEN, *Senior Judge*, DAVIS, NICHOLS, KUNZIG, BENNETT and SMITH, *Judges*,

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OPINION

DAVIS, *Judge*, delivered the opinion of the court:

This case arises out of the Menominee Termination Act of 1954, Pub. L. No. 399, ch. 303, 68 Stat. 250, *as amended*, 25 U.S.C. §§ 899-902 (1970), a different aspect of which was previously before the court in *Menominee Tribe of Indians v. United States*, 179 Ct. Cl. 496, 388 F.2d 998 (1967), *affirmed* 391 U.S. 404 (1968). Under the Treaty of Wolf River in 1854, 10 Stat. 1064, the Menominee Tribe received and occupied for over a century a reservation in Wisconsin. In 1953 Congress by concurrent resolution (H. Con. Res.

108, 67 Stat. B132) directed the Secretary of the Interior to recommend legislation for withdrawing federal supervision over certain American Indian tribes, including the Menominees. A year or so later, the Congress passed the Menominee Termination Act of 1954, amending it in 1956 (Pub. L. No. 715, ch. 601, Pub. L. No. 718, ch. 604, 70 Stat. 544, 549), 1958 (Pub. L. No. 85–488, 72 Stat. 290), and 1960 (Pub. L. No. 86–733, 74 Stat. 867). Actual termination came about on April 30, 1961.

As summarized by the Supreme Court, 391 U.S. at 408–10, the purpose of the Termination Act was by its terms " 'to provide for orderly termination of Federal supervision over the property and members' " of the tribe. Under the Act's provisions (as amended), the tribe was to formulate a plan for future control of tribal property and service functions theretofore conducted by the United States. On or before April 30, 1961, the Secretary was to transfer to a tribal corporation or to a trustee chosen by him all property real and personal held in trust for the tribe by the United States. The Act also provided for closing of the membership roll of the tribe; this was done in December 1957.

"The Menominees submitted a plan, looking toward the creation of a county in Wisconsin out of the former reservation and the creation by the Indians of a Wisconsin corporation to hold other property of the tribe and its members. The Secretary of the Interior approved the plan with modifications; the Menominee Enterprises, Inc. [one of the plaintiffs herein] was incorporated; and numerous ancillary laws were passed by Wisconsin integrating the former reservation into its county system of government." 391 U.S. at 408–09 (footnotes omitted). The Act also provided that after the transfer by Interior of title to the property of the tribe, all federal supervision was to end in that "individual members of the tribe shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians," and "all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe." 25 U.S.C. § 899 (1970). The Act

goes on to say that "the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction." *Id.*[1]

Much dissatisfied with the termination and its results, the Menominee Tribe (together with various representatives of that entity and its members) brought this suit in April 1967, under 28 U.S.C. § 1491 and § 1505, for various items of damage said to have followed upon the Termination Act and the termination. The essential charge is that the passage and implementation of the Act was a breach of the trust owned by the United States to the Menominees, and in some instances a violation of the Just Compensation Clause of the Fifth Amendment.[2]

The trial judge and the parties agreed to present first to the court the general issue of whether the United States is liable to the plaintiffs for breach of trust on account of the enactment and putting into effect of the Termination Act. Accordingly, after a trial devoted to that subject (and others), Trial Judge Spector issued his opinion and findings on that question.[3] Without in any way separating the Congressional action in considering and enacting the Termination Act, or the mandatory provisions of that Act, from the actions of the Interior Department under the statute and other legislation, the trial judge ruled that a breach of trust had occurred (reserving for further determi-

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[1] We have held that the Termination Act did not abolish the tribe and that the Menominee Indians continue to constitute a tribe which is eligible to bring suit here under 28 U.S.C. § 1505. *Menominee Tribe of Indians v. United States, supra*, 179 Ct. Cl. at 500–01, 388 F.2d at 1000–01.

[2] The original petition included claims bearing the following descriptions: Menominee Deed (Forest) Restrictions; Forest Management; Mill Mismanagement; Highway Rights of Way; Power Line Right of Way; Public Sewerage System; Soo-Line Right of Way (Railroad); Termination Expenses; and Mismanagement of Tribal Funds. Plaintiffs have since abandoned the claim entitled Soo-Line Right of Way and added one entitled Loss of Tax Exemption. Pursuant to request of counsel, an order was issued May 21, 1973 separating the claims into nine separate dockets as follows: Deed Restrictions No. 134–67A; Forest Mismanagement No. 134–67B; Mill Mismanagement No. 134–67C; Highway Rights of Way No. 134–67D; Termination Expenses No. 134–67E; Loss of Tax Exemption No. 134–67F; Power Line Rights of Way No. 134–67G; Public Sewerage System No. 134–67H; Mismanagement of Tribal Funds No. 134–67I (severed for later trial).

[3] The opinion is denominated by the trial judge as "the basic opinion underlying a large and complex group of cases each involving a separate claim."

nation the damages arising out of that breach). Detailing the reasons why he considered that termination was not in the best interests of the Menominees but was initiated by the United States for its own interests, and why he considered that the Menominees were pressured and pushed into termination without adequate assistance and against their own interests—with "disastrous effect upon the Indians' assets and way of life"—the trial judge concluded that this constituted "an abrogation of defendant's fiduciary obligations growing out of its treaty and trust relationship to plaintiffs, and that defendant's acts and omissions constitute a breach of the fiduciary duty owed to plaintiffs." The general bases of this holding are revealed by the trial judge's ultimate findings of fact which we reproduce in the footnote.[4] It is clear that the primary

[4] 108. The Menominee Termination Act was initiated by the United States, in the interests of the United States. It was not in the best interests of the Menominees as a tribe nor as individual Indians that the federal trusteeship be terminated. Termination policy was initiated by the United States in order to "get out of the Indian business" and to reduce costs, specifically within the Bureau of Indian Affairs.

109. The Menominee Tribe and its members did not effectively consent to termination of federal supervision and trusteeship over the tribe, its members, and its assets.

110. Termination was not warrnted under any of the four criteria established by Acting Commissioner of Indian Affairs Zimmerman. Defendant failed to apply the criteria which it enunciated. Adequate studies were not made and had they been made in advance, they would have demonstrated that the Menominee did not meet those criteria for termination.

111. Following passage of the Termination Act in 1954, defendant failed to adequately assist the Menominees to prepare for final termination which became effective in 1961.

112. During the period 1954–1961 it became apparent that the Menominees were not prepared for termination and that the tribe and its assets would suffer harmful consequences if a termination policy was implemented. There was, nevertheless, no reappraisal of the policy of termination.

113. The Menominees were not trained to assume the extensive responsibilities imposed upon them by involuntary termination. They were not trained in self-government, nor to assume supervisory management or sub-management positions with respect to the Menominee Forest or sawmill operations.

114. If termination was to be imposed on the Menominee Tribe, it required a period of from one to two generations (20–40 years), of phased withdrawal from federal supervision, to effect the transition without serious damage to the tribe.

115. Failure of the defendant to prepare the tribe for termination, and the imposition of termination without the necessary preparation, constituted an abrogation of defendant's fiduciary obligations growing out of its treaty and trust relationship to the Menominee Tribe and its members. Defendant's acts and omissions constitute breach of a fiduciary duty owned to plaintiffs.

ground of the trial judge's conclusions is the enactment of the Termination Act and its provisions.

The case is now before us on the Government's exceptions to the trial judge's opinion and findings in which it argues mainly that there was no breach of duty, imposed by treaty or statue, by the United States in terminating federal supervision of the Menominee Tribe. We do not consider that question because it is our view that, in 28 U.S.C. §§ 1491 and 1505, Congress has not consented to suit by Indians in this court on non-constitutional claims for breach of trust based directly on the passage and enactment by Congress of legislation it considers appropriate but which the claimant deems a violation of a fiduciary obligation. In other words, we do not understand our general jurisdictional provisions as giving us authority to entertain a suit contending that a statute passed by Congress, though valid and constitutional, is nevertheless a breach of trust owed by the Federal Government to the Indians.[5]

I.

It is important to underscore at the beginning that this case, as it now comes to us, does not involve at this stage any claim by the Indian plaintiffs for a Fifth Amendment taking (contrast *Sioux Nation of Indians v. United States*, 220 Ct. Cl. ____, 601 F.2d 1157 (1979)),[6] or any argument that the Termination Act was constitutionally invalid in any respect. The entire claim is that the passage, enactment, and implementation of the Termination Act (as amended), pursuant to its terms, was a non-constitutional breach of the trust which the United States, as a governmental entity, owed to the Menominees under various treaties and long-continued practice.[7]

[5] The trial judge assumed without discussion that there was jurisdiction over all Indian claims for breach of trust, of whatever character, and made absolutely no distinction in his opinion or findings between the actions of Congress setting policy and directing conduct and the conduct of executive officials contrary to Congressional policy and directives.

[6] Certain of the individual claims (*see* note 2, *supra*) do present such claims of a constitutional taking.

[7] There is no claim, and we do not think there could be, that the Termination Act

In deciding whether (or to what extent) Congress has given us jurisdiction of such a suit, we, assume *arguendo* and without in any way determining, first, that such a trust relationship existed with respect to the Menominees; second, that the trial judge correctly decided the underlying facts and circumstances on which he based his ultimate findings; and third, that the ultimate findings are correct. Since we conclude that the court has no jurisdiction of at least the bulk of this "basic" claim, we have no occasion to review most of the findings. As for the few findings which may have some bearing on the aspects of the separate claims which still survive, we think it better not to consider or adopt them, so that the separate claims can be evaluated wholly afresh and apart from the trial judge's basic opinion (and the related findings) which in our view entertained and upheld a general claim over which this court has at this time no jurisdiction.

II.

We have twice recently upheld our jurisdiction over a non-constitutional breach of trust claim by Indians. *Mitchell v. United States*, 219 Ct. Cl. ___, 591 F.2d 1300, *cert. granted*, 99 S. Ct. 2880 (1979); *Duncan v. United States*, 220 Ct. Cl. ___, 597 F.2d 1337 (1979). But both cases involved solely claims that the Interior Department had acted improperly under Congressional legislation imposing trust duties on that agency which it was said to have violated. In neither instance was it claimed that the enactment of any statute was itself a breach of trust. In *Mitchell* the Indians accepted and relied on various statutes, primarily the General Allotment Act, 25 U.S.C. §§ 331 et seq. (1976), urging merely that the Interior Department had failed to follow the requirements of those Acts. Likewise, in *Duncan*, involving the termination of the Robinson Rancheria in California, the plaintiffs relied squarely on the Rancheria

created a contract between the Menominees and the United States which was breached by the later amendments or by the Interior Department in carrying out the termination. *See Klamath & Modoc Tribes v. United States*, 193 Ct. Cl. 670, 697, 436 F.2d 1008, 1022, *cert. denied*, 404 U.S. 950 (1971) (Klamath Termination Act did not create a contract).

Act, Pub. L. No. 85–671, 72 Stat. 619 (1958), saying (as we held) that the Secretary of the Interior had not abided by the statutory requirements.[8]

This is the first time we have confronted the separate and distinct issue of whether 28 U.S.C. §§ 1491 and 1505 give us jurisdiction of a nonconstitutional breach of trust claim for money—not because some federal official contravened a governing statute or treaty—but because Congress itself, in enacting a statute, violated (without trenching on the Constitution) a general trust obligation owed by the United States as a government to the Indians.

III.

The problem is whether 28 U.S.C. §§ 1491[9] and 1505[10] authorize us to consider that kind of monetary claim. Congress could, of course, grant such consent if it wished. It did so (at least in part) in section 2 of the Indian Claims Commission Act, Pub.L. No. 726, ch. 959, 60 Stat. 1050, 25 U.S.C. § 70a (1976), which authorized the Commission to hear (among other types) "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity." Under that broad rubric the Commission (and this court on appeal) considered conten-

[8] All of the earlier Indian breach of trust cases decided by this court under our general jurisdictional provisions (*see Mitchell, supra*, 591 F.2d at 1303; *Duncan, supra*, 597 F.2d at 1345–46) also involved claims either that officials of the Government had acted improperly under controlling statutes or treaties, or that there had been a Fifth Amendment taking. Similarly, all the Supreme Court decisions cited by plaintiffs, or of which we are aware, involved the same type of claims.

[9] 28 U.S.C. § 1491 provides in pertinent part:

"The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

[10] 28 U.S.C. § 1505 provides:

"The Court of Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the Preisdent, or is one which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band or group."

tions that treaties ratified by Congress or legislation passed by it amounted to less than fair and honorable dealings, or that Congress's failure to act fell into that same class. *See, e.g., Oneida Tribe of Indians of Wisconsin v. United States*, 165 Ct. Cl. 487, 496–97, 499–500, *cert. denied*, 379 U.S. 946 (1964); *Seminole Nation of Oklahoma v. United States*, 203 Ct. Cl. 637, 492 F.2d 811 (1974); *United States v. Goshute Tribe*, 206 Ct. Cl. 401, 407–08, 512 F.2d 1398, 1400–01 (1975); *United States v. Oneida Nation of New York*, 217 Ct. Cl. ___, 576 F.2d 870 (1978). In the two Sioux *Nation* cases, the entire court agreed that an award could be made under the "less-than-fair-and-honorable" provision for the acquisition by Congress of the Black Hills through an 1877 statute—the only disagreement was whether a constitutional taking had occurred. *See United States v. Sioux Nation*, 207 Ct. Cl. 234, 518 F.2d 1298, *cert. denied*, 423 U.S. 1016 (1975); *Sioux Nation v. United States*, 220 Ct. Cl. ___, 601 F2d 1157 (1979), including the dissent of Bennett, J.[11]

But neither section 1491 nor section 1505 contains any provisions comparable to the "fair and honorable dealings" clause or the clause countenancing revision of treaties, etc. for fraud, unconscionable consideration, etc. (note 11, *supra*). The predecessor of section 1505 was originally a part of the Indian Claims Commission Act of 1946 and Congress obviously knew that that new jurisdictional provision for future litigation directly in this court was different from and narrower than the very broad jurisdictional provisions for the claims to be heard initally by the Commission.[12] *See Klamath and Modoc Tribes v. United States*, 174 Ct. Cl. 483, 486–90 (1966).

When we examine the words of sections 1491 and 1505 against the historical background of legislative consents-to-suit by Indians in this court, we cannot find that Congress has empowered us to hear and to determine nonconstitu-

[11] To some extent nonconstitutional claims on account of Congressional action could also be brought before the Indian Claims Commission under clause (3) of section 2, 25 U.S.C. § 70a: "[C]laims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or of fact, or any other ground cognizable by a court of equity."

[12] Section 1505 was first enacted as section 24 of the Indian Claims Commission Act, Pub.L. No. 726, ch. 959, 60 Stat. 1055.

tional claims that a fiduciary duty toward Indians has been breached by the passage of legislation by the Congress itself. We look first to the text of the jurisdictional statutes (*see* notes 9 and 10, *supra*)

Section 1491: At this time there is no claim before us founded on the Constitution. *See* Part I, *supra*. Accordingly, the grant of jurisdiction over claims founded on the Constitution is now irrelevant. Nor is the claim of breach of trust we are considering "founded" upon an "Act of Congress." The cause of action is plainly not "founded" upon the Termination Act in the sense that that legislation is invoked as the source of plaintiffs' rights; rather, the statute is pointed to as breaching plaintiffs' preexisting rights said to flow from prior treaties or from the general law of Indian relations. Neither is the claim we confront today "founded" on "any regulation of an executive department," nor could it be in view of the enactment of the Termination Act (which would, of course, displace any prior executive regulation). Perhaps the early treaties on which plaintiffs rely for their claim of a trust obligation could possibly be deemed an "express or implied contract with the United States" if bare language alone were to be taken into account. But the general history of consents-to-sue in this court (which we evaluate in detail *infra*) counsels strongly against including within that category Indian treaty provisions subsequently modified or displaced by a valid Act of Congress such as the Termination Act. The same is true for the provision for jurisdiction over "liquidated or unliquidated damages in cases not sounding in tort," the least developed and least known of our kinds of jurisdiction. For interpretation of that little-invoked clause (as with the other parts of the Tucker Act), history counts more than the dictionary in discovering the Congressional purpose. *See United States v. King*, 395 U.S. 1, 5 (1969).

Section 1505: Everything we have said about the terms of section 1491 applies as well to section 1505, which substantially tracks section 1491 and has been construed to cover the full ground of the latter. *See Klamath and Modoc Tribes v. United States, supra*, 174 Ct. Cl. 483, 489–90

(1966); *Mitchell v. United States*, *supra*, 219 Ct. Cl. ——, 591 F.2d 1300, 1302 n.10.

This review of the statutory texts may show that, if we concentrated on the language alone, we could conceivably interpret portions of sections 1491 and 1505[13] as supporting the jurisdiction plaintiffs urge (and which the trial judge assumed) for this nonconstitutional claim for breach of trust occasioned by Congress's passage of the Termination Act. But the language is neither unambiguous nor exact, and we are persuaded against that position by the historical treatment of consents to Indians to sue the sovereign in this court, as well as by the prevailing views as to the power of Congress over Indian relationships (where, as here, the Constitution is not involved).

There is, first of all, the accepted canon that consents to sue the United States are not to be found where expressed only equivocally. *United States v. Testan*, 424 U.S. 392, 399 (1976); *United States v. King*, 395 U.S. 1, 4 (1969). On the precise issue now presented, we have nothing at all express in the statutes but only some general and ordinary words which can possibly be stretched to cover the claim, but need not necessarily be so understood. In contrast, as we have seen, Congress was much more wide-ranging, liberal, and explicit in the words it used (for Indian Claims Commission jurisdiction) in section 2 of the same Indian Claims Commission Act which created the forerunner of section 1505.

Second, it has also been established for at least seventy years that Congress has the unilateral and plenary power (to the extent that there is no violation of the Constitution, including the Just Compensation Clause) to abrogate or modify, by statute, a prior treaty with Indians. *See Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *Choate v. Trapp*, 224 U.S. 665, 670–71 (1912); *Shoshone Tribe v. United States*, 299 U.S. 476, 497 (1937); *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 84 (1977); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 587–88, 594, 598 (1977); Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213, 1223–27 (1975).

[13] *I.e.*, "express or implied contract," "liquidated or unliquidated damages in cases not sounding in tort," "treaties."

In the light of this principle, it is hard to believe—simply by using "treaties" in section 1505 or "an express or implied contract" in section 1491 or "any claim * * * for liquidated or unliquidated damages in cases not sounding in tort" in the same provision—that Congress envisaged monetary suits in this court based on a claim that a valid, constitutional[14] *statute* abrogating, modifying, or "breaching" a prior Indian treaty was nevertheless a compensable breach of trust or fiduciary duty. The concept that a valid Act pertaining to Indians can be, in itself, a violation of fiduciary duty, which is vindicable as a legal claim, was not at all formed when the predecessors of section 1491 were passed,[15] and in 1946 when section 1505 first became law such a cause of action appears to have been deemed purely "moral" (and redressable only before the Indian Claims Commission under section 2, *supra*, or under a properly worded special jurisdictional act).[16] It is, of course, common ground that section 1505 blankets only legal, not purely moral, claims. *See Mitchell v. United States*, *supra*, 219 Ct. Cl. at ——, 591 F.2d at 1303; *Navajo Tribe v. United States*, 218 Ct. Cl. ——, 586 F.2d 192, 200–01 (1978), *cert. denied*, 99 S.Ct. 2163 (1979); *Klamath and Modoc Tribes v. United States*, 174 Ct. Cl. 483, 487–90 (1966).

Third, in the days when Indians could sue in this court only under special jurisdictional statutes, there was a strong tradition that such a special act would not be construed as allowing the court (or the Supreme Court on appeal) to pass on the fairness or justice of an Act of Congress, or of a treaty ratified by Congress, unless the

[14] Including the absence of any duty to pay just compensation.

[15] *See* W. Cowen, P. Nichols, M. Bennett, *The United States Court of Claims—A History*, Part II ("Origin—Development—Jurisdiction, 1855–1978"), 216 Ct. Cl. 63–64, 69–70, 72, 73 (1978).

[16] The legislative history of the predecessor of section 1505 speaks only of wrongdoings by federal officials and does not mention a constitutional statute as being the possible source of a compensable claim. *See Michell v. United States*, *supra*, 219 Ct. Cl. at ——, 591 F.2d at 1303–04. There is a reference to the Indians being able to sue on "any controversy with the Federal Government that may arise in the future," but this was said in the context that the Indian would thereafter have "the same right as his white or black neighbor to secure a full and free hearing in the Court of Claims * * *." Since there are very few, if any, instances in which non-Indians can claim in this court that a fully valid statute violates their rights, we hardly think that the general reference to "any controversy with the Federal Government" covers the present claim.

language of the jurisdictional statute compelled that result. For a court to pass upon the fairness, justice, good faith, or propriety of a valid Congressional act was considered unseemly, and an intrustion on the domain of the legislative department. *See United States v. Mille Lac Band*, 229 U.S. 498, 500 (1913); *United States v. Choctaw Nation*, 179 U.S. 494, 532–35 (1900); *United States v. Old Settlers*, 148 U.S. 427, 466, 468, 469 (1893); *Sioux Tribe of Indians v. United States*, 97 Ct. Cl. 613, 663–65, 681–82, 684, 685 (1942), *cert. denied*, 318 U.S. 789 (1943); *Chippewa Indians v. United States*, 88 Ct. Cl. 1, 45, *aff'd on other grounds*, 307 U.S. 1 (1939); *see also Menominee Tribe of Indians v. United States*, 101 Ct. Cl. 10, 21 (1944).

When Congress came to enact Section 1505 in 1946, to control future Indian litigation in this court, it did not use any words, or reveal any aim, to show that it wished to go beyond this tradition (except where the Constitution was involved). By contrast, it did make a deliberate effort to extend as much as possible the jurisdiction of the Indian Claims Commission over past wrongs, legal and moral. *See Klamath and Modoc Tribes v. United States, supra*, 174 Ct Cl. at 489.[17]

These considerations impel us to hold that sections 1491 and 1505, as now worded, do not authorize us to entertain the nonconstitutional claim that the enactment of the Termination Act of 1954 was a breach of trust by Congress for which the plaintiffs can obtain monetary relief. We think that, for us to consider such a claim, Congress would have to be more definite and precise in granting us that type of jurisdiction. This is our reading of the general language of sections 1491 and 1505, in the light of the historical background of Indian rights and Indian litigation against the sovereign.

[17] *Klamath and Modoc Tribes* quotes at length from the Congressman Jackson, principal House sponsor of the Indian Claims Commission bill, who said:

"In order to make sure that we have included all possible claims within the jurisdiction of the Commission, we have gone over the various special Indian jurisdictional acts that Congress has passed in recent years and put together the various phrases that are used in these different acts. We might have condensed this language but we though it best even at the risk of some duplication or overlapping to make sure that we had covered every sort of case which Congress has in recent years considered worthy of a hearing. It will be noted that some of the categories refer to purely legal claims, while others refer to claims based on equity and fair dealing * * *." [92 Cong. Rec. 5312-13 (1946)]

As shown by our opinions in *Mitchell* and *Duncan* (see Part II, *supra*), we think that breaches of trust resulting from the actions of officials of the Government in violation of a valid treaty or statute are quite different, and within our authority. For that type of breach of trust, we believe that Congress has already granted consent to sue.[18] But when the valid acts of Congress itself are assailed as unjust, unfair, in bad faith, or blind to the Indians' interest—in a case not raising a constitutional claim—we do not believe that Congress intended in sections 1491 or 1505 to repose that unusual authority, novel except for Indian Claims Commission cases, in this court.[19]

IV.

In 1973 Congress enacted the Menominee Restoration Act, Pub. L. No. 93–197, 87 Stat. 770, 25 U.S.C. §§ 903–903f (1976), which repealed the Termination Act and generally restored the Menominee Tribe and reservation to trust status. Plaintiffs cite this statute as a legislative recognition that the Termination Act was in derogation of the United States' fiduciary responsibilities to the tribe. Whether or not this is so, the Restoration Act does not grant this court any jurisdiction it would not have if the Termination Act had been left unrepealed.

The legislative history of the restoration statute does contain substantial material reflecting adversely on the passage of the Termination Act (*see, e.g.*, S. REP. No. 93–604, 93rd Cong., 1st Sess. 3 (1973); H. REP. No. 93–572, 93rd Cong., 1st Sess. 3 (1973)), but there is nothing in the

[18] In *Mitchell* and *Duncan*, (a) an Act of Congress gave or confirmed a trust relationship between the Federal Government and the Indians, (b) executive officials were alleged to have acted contrary to this Congressional legislation and thus to have breached the trust Congress established or recognized, and (c) the Indian plaintiffs claimed that compensable damages flowed from these breaches of trust by the officials. On those premises we held that we had jurisdiction under sections 1491 and 1505, and that this interpretation accorded with the revealed Congressional purpose, as well as the prior decisions of the Supreme Court and this court. The same is true of *Coast Indian Community v. United States*, 213 Ct. Cl. 129, 152–56, 550 F.2d 639, 652–54 (1977) (in which there was no challenge to jurisdiction).

[19] When Congress provided for transfer of undecided Indian Claims Commission cases to this court, it made express that this court's regular jurisdiction under section 1505 was not broadened in any way. Act of March 30, 1972, Pub. L. No. 92–265, § 23, 86 Stat. 114, 115, 25 U.S.C. § 70v (1976).

1973 enactment remotely granting to or recognizing in the Menominees any monetary claim against the United States for the termination or its results, or extending this court's jurisdiction to cover such a claim. There is no such provision in the text of the statute, nor can any such inference be drawn. On the contrary, both committee reports explicitly disavow any implication of a monetary claim which some feared might arise from one of the provisions of the Restoration Act. S. REP. No. 93–604, *supra*, at 6; H. REP. No. 93–572, *supra*, at 4.[20]

V.

The jurisdictional barrier against our appraisal of Congress's action in enacting the Termination Act covers (a) any evaluation of Congressional motives or the interests Congress was pursuing; (b) any alleged failure of Congress to prepare the Menominees for termination, to make a full and fair disclosure to them of all pertinent facts, to allow further time before termination was effected, to give greater assistance to the Indians in the termination process, to reconsider the policy of termination, to adopt modified legislation, or to determine before final amendment of the Act whether the Tribe and its members were ready to assume management and control of their property and affairs; and (c) any alleged duress or pressure by Congress or its members on the Menominees to obtain their consent to termination. It follows that very little is left of the "basic" claim now before us since that relates almost entirely to the passage and enactment of the Termination Act and its amendments. Plaintiffs assure us repeatedly that we should not now consider any of the specific claims (see note 2, *supra*), including the constitutional contentions that plaintiffs are entitled to just compensation because Congress imposed a post-termination sustained yield requirement on the Menominee forest

[20] The reports said: "Some concern was expressed that section 3(b) reinstating the tribe and its members to all rights and privileges under any Federal treaty, statute or otherwise which might have been lost or diminished by the termination act, might be interpreted to be retroactive to 1954, thus giving rise to claims against the United States. The Committee wishes to make clear that the subsection has no retroactive effect and is not intended to be the basis for any claim against the United States."

or because the Interior Department included a 30-year restraint on alienation in the deed of the forest land to Menominee Enterprises, Inc.[21] See Plaintiffs' Brief In Opposition, pp. 28, 31, 48, 62–63, 64, 66. We take plaintiffs at their word, but add that these specific claims will, of course, have to be decided within the limits of our jurisdiction.

There is some suggestion, moreover, that, even if there is no jurisdiction over the claim for breach of trust through the passage of the Termination Act, the defendant is liable because the Interior Department failed in its own obligations toward the Indians with respect to the termination process. Most aspects of this contention fall with our holding of lack of jurisdiction over Congress's conduct in passing the Act. That ruling cannot be evaded by saying that, although we cannot examine the fairness or propriety of the legislative process, we can hold the defendant liable because the Interior Department did not itself undertake to try to stop Congress or to advise or persuade it differently or to do more than Congress required of it in order to prepare the Menominees for the termination Congress had ordered. Interior's role cannot thus be separated from that of Congress. Unless the Department violated the Constitution or some outstanding directive of Congress, the United States cannot be held liable for Interior's affirmative actions or passive omissions with respect to the passage and implementation of the Termination Act.

There is a small residue of argument that Interior did violate the Termination Act.[22] Plaintiffs attempt to enlarge the Department's obligations under the statute by pointing to the opening section which declares that the general purpose is "to provide for *orderly* termination of Federal supervision" (emphasis added). 25 U.S.C. § 891 (1970). It is hard to see in that routine descriptive phrase any directive to the Secretary above and beyond the specific duties

[21] They also tell us that three of the claims (forest mismanagement; sawmill mismanagement; and power line right-of-way) are wholly unrelated to the termination.

[22] We consider that we have jurisdiction of this type of claim. *Mitchell v. United States*, *supra*; *Duncan v. United States*, *supra*. The discussion which follows centers on whether plaintiffs have stated a proper claim.

placed upon him by the subsequent sections of the legislation (or the Constitution, or other legislation). Neither the rest of the terms of the Act nor its legislative history suggest that the Secretary was to have a wider or more protective role under the Act than the specific provisions gave him. Plaintiffs themselves characterize the Act as part of an effort "to get out of the Indian business"—and in somewhat of a hurry.

The only specific provisions of the Termination Act now invoked by plaintiffs are the parts of 25 U.S.C. § 896 relating to the preparation and adoption of a plan for the future control of the tribal property and service functions. Section 896 first calls upon the Indians to formulate and submit such a plan to the Secretary for his approval, and also authorizes the Secretary "to provide such reasonable assistance as may be requested by officials of the tribe in the formulation of the plan." The Secretary is to accept the tribal plan if he finds that it "will treat with reasonable equity all members" and "conforms to applicable Federal and State law." If the tribe failed to submit a plan within the specified time, the Secretary had to prepare and submit a plan to the Tribe.[23] (The provisions for failure of the

[23] Section 896 (section 7 of the original Termination Act, as amended) provided as follows:

The tribe shall as soon as possible and in no event later than February 1, 1959, formulate and submit to the Secretary a plan for the future control of the tribal property and service functions now conducted by or under the supervision of the United States, including but not limited to services in the fields of health, education, welfare, credit, roads, and law and order, and for all other matters involved in the withdrawal of Federal supervision. The Secretary is authorized to provide such reasonable assistance as may be requested by officials of the tribe in the formulation of the plan heretofore referred to, including necessary consultations with representatives of Federal departments and agencies, officials of the State of Wisconsin and political subdivisions thereof, and members of the tribe. The Secretary shall accept such tribal plan as the basis for the conveyance of the tribal property if he finds that it will treat with reasonable equity all members on the final roll of the tribe prepared pursuant to section 893 of this title, and that it conforms to applicable Federal and State law. In the event the tribe fails to submit a plan approvable under the terms of sections 891 to 902 of this title by February 1, 1959, the Secretary shall cause such a plan to be prepared and submitted to the tribe within three months thereafter. The tribe shall thereafter have three months within which to accept the plan of the Secretary or to submit to the Secretary tribal proposals for modification. If the Menominee Tribe and the Secretary cannot agree upon a plan within the aforementioned six-month period, or if they agree upon a plan within such period and the tribal corporation and voting trust

Menominees to submit a plan are immaterial here since they did submit a plan in time.)

The only possible violation by Interior of Section 896, which placed the initial burden of preparing and formulating the plan on the tribe, would be in the Secretary's improper approval of the plan and any failure to provide "reasonable assistance *as may be requested by officials of the tribe* in the formulation of the plan" (emphasis added). There appears to be no argument that the Secretary's approval of the plan failed to comply with the statutory standard, but we leave that issue open.[24] As for the provision for reasonable assistance, we do not understand that any request by the Tribe for reasonable assistance (of the kind authorized by the statute) was turned down or left unsatisfied. However, we leave that question open, also, if plaintiffs wish to pursue it further. In view of the precise wording of the Secretary's authority as to assistance, we cannot agree that Interior was required to proffer advice or assistance not sought by the Menominees (who were represented by skilled attorneys) and perhaps not wanted.

Because plaintiffs have rolled both Congressional action (and inaction) and departmental action (and inaction) into one inseparable claim of breach of trust, we are not sure of the extent to which plaintiffs are complaining that Interior violated, in connection with the termination, statutes other than the Termination Act. For instance, plaintiffs' brief

contemplated by the plan are not established prior to March 1, 1961, the Secretary shall transfer the tribal property to a trustee of his choice for the management or disposition for the benefit of the Menominee Tribe. The responsibility of the United States to furnish all such supervision and services to the tribe and to the members thereof, because of their status as Indians, shall cease on April 30, 1961, or on such earlier date as may be agreed upon by the tribe and the Secretary. The plan shall contain provision for protection of the forest on a sustained yield basis and for the protection of the water, soil, fish and wildlife. To the extent necessary, the plan shall provide for such terms of transfer pursuant to section 897 of this title, by trust or otherwise, as shall insure the continued fulfillment of the plan. The Secretary, after approving the plan, shall cause the plan to be published in the Federal Register. The sustained yield management requirement contained in sections 891 to 902 of this title, and the possible selection of a trustee in the event of a tribal planning default, shall not be construed by any court to impose a financial liability on the United States.

[24] We do not agree with plaintiffs' apparent contention that the Termination Act gave the Secretary general authority to disapprove the plan if he thought the Menominees unprepared for termination, or that he could delay termination on that ground. Section 896 establishes a specific time-table envisaging speedy completion of the process.

refers to loss of the Menominees' hospital shortly after termination in 1961 because the Bureau of Indian Affairs had failed, in remodeling the hospital with the Menominees' own funds, to take account of Wisconsin state structural requirements, although the Bureau was well aware that termination was coming and that such state demands would have to be met. If this contention is factually correct, it might prove to be a violation of other legislation giving the Bureau control over the Indians' funds. There is also a claim that the Bureau drastically reduced its reservation staff after passage of the Termination Act but before actual termination. This charge might be sustained, if it turned out that this alleged drastic reduction was not a proportionate cut due to a general reduction-in-force in all Bureau functions or services, but a unique, premature withdrawal by the Bureau (on its own) of services available to the Menominees simply because the Bureau knew they were going to be terminated some time later.[25]

We leave open issues of this type because we are not clear as to their alleged foundation. The controlling standard for further proceedings will be that the following types of claim may still be litigated: (a) claims said to arise under the Constitution; (b) claims that the Interior Department violated the Termination Act in the respects left open by the preceding discussion in this opinion; (c) claims that the Interior Department violated other statutes in its dealings with the Menominees; and (d) the specific claims set forth in note 2, *supra*, insofar as they do not rest on Congress's (or the Interior Department's) alleged breach of fiduciary duty through the passage and enactment of the Termination Act.[26]

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[25] To the extent this claim rests on a failure or refusal of Congress to appropriate the funds plaintiffs deem sufficient, we think that the claim is beyond this court's jurisdiction for the reasons already given. *Cf. Klamath and Modoc Tribes v. United States*, 193 Ct. Cl. 670, 696–97, 436 F.2d 1008, 1021–22, *cert. denied*, 404 U.S. 950 (1971); *Oneida Tribe of Indians of Wisconsin v. United States*, 165 Ct. Cl. 487, 499–500, *cert. denied*, 379 U.S. 946 (1964) (Indian Claims Commission case).

[26] Because of our disposition, it is unnecessary to reach defendant's point as to the statute of limitations. That issue will also remain open for further litigation if defendant wishes to press it.

CONCLUSION OF LAW

The trial judge's opinion and findings are vacated and the case is returned to him for further proceedings in conformity with the foregoing opinion. The petition in No. 134–67 is dismissed to the extent indicated in the foregoing opinion.

APPENDIX B

IN THE
UNITED STATES COURT OF CLAIMS
TRIAL DIVISION

No. 134-67 (Basic)

(Filed: July 19, 1978)

THE MENOMINEE TRIBE OF INDIANS, suing on its own behalf and as the representative of its members, or their successors, as a class; and MENOMINEE ENTERPRISES, INC., suing on its own behalf and as the representative of its stockholders, or their successors, as a class; and GORDON DICKIE, JAMES FRECHETTE, JERRY GRIGNON, and GEORGE KENOTE, each suing on his own behalf and as the representative of the members of the Menominee Tribe of Indians, or their successors, as a class, and as the representative of the stockholders of Menominee Enterprises, Inc., or their successors, as a class; and FIRST WISCONSIN TRUST COMPANY, suing as trustee on behalf of all the beneficiaries, or their successors, of the Menominee Assistance Trust established pursuant to the Menominee Termination Act of 1954, 25 U.S.C. §§ 891-902

v.

THE UNITED STATES

Indians: termination of federal supervision and protection; history, background and validity of termination policy; trust or fiduciary relationship existing between the parties; duties and responsibilities of trustee; breach of fiduciary duty in termination of federal supervision and protection without adequate preparation of, nor effective consent by the subjects of the trust; coercion, and capacity of *cestui que* trust or ward to consent to termination of trust relationship; imposition of restrictions on tribal property.

Angelo A. Iadarola, attorney of record, for plaintiff. *Frances L. Horn, R. Anthony Rogers, Philip A. Nacke, Wilkinson, Cragun & Barker,* of counsel.

Richard L. Beal, with whom was *Assistant Attorney General Kent Frizzell,* for defendant.

OPINION*

SPECTOR, *Trial Judge:* This is the basic opinion underlying a large and complex group of cases[1] each involving a separate claim.[2] All of the cases are predicated upon a fifth amendment taking without just compensation, and/or breach of a fiduciary duty by defendant. The basic opinion herein deals with the general back-

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*The trial judge's recommended decision and conclusion of law are submitted in accordance with Rule 134(h).

[1]The plaintiffs are composed of the following: The Menominee Tribe of Indians, Menominee Enterprises, Inc., four named individuals: Gordon Dickie, James Frechette, Jerry Grignon and George Kenote, and the First Wisconsin Trust Company appointed as trustee under the Menominee Assistance Trust to protect the rights of members of the tribe less than 18 years of age, *non compos mentis,* or otherwise incompetent.

[2]The original petition included claims bearing the following descriptions: Menominee Deed (Forest) Restrictions; Forest

[footnote continued]

ground and history of the Menominee Termination Act, the preexisting relationship between the parties, and the legal consequences attendant upon termination of that relationship.

I. General Historical Background

An earlier case involving the Menominee Indians provides an authoritative summary of the history of the tribe and of its lands. It illustrates that they have lived "as a tribe since time immemorial in Wisconsin"[3] and that they had acknowledged themselves to be under the protection of the United States as early as 1817.[4]

Thereafter, in a series of treaties between 1825 and 1848, the Menominee ceded their entire land holdings to

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Management; Mill Mismanagement; Highway Rights of Way; Power Line Right of Way; Public Sewerage System; Soo-Line Right of Way (Railroad); Termination Expenses; and Mismanagement of Tribal Funds. Plaintiffs have since abandoned the claim entitled Soo-Line Right ofWay and added one entitled Loss of Tax Exemption. Pursuant to request of counsel, an order was issued May 21, 1973 separating the claims into nine separate dockets as follows: Deed Restrictions No. 134-67A; Forest Mismanagement No. 134-67B; Mill Mismanagement No. 134-67C; Highway Rights of Way No. 134-67D; Termination Expenses No. 134-67E; Loss of Tax Exemption No. 134-67F; Power Line Rights of Way No. 134-67G; Public Sewerage System No. 134-67H; Mismanagement of Tribal Funds No. 134-671 (severed for later trial).

[3] *Menominee Tribe of Indians, et al. v. United States*, 179 Ct. Cl. 496, 501-02, 388 F.2d 998, 1001 (1967) *aff'd* 391 U.S. 404 (1968). This decision also holds that the Menominee Tribe of Indians continued to exist as a tribal entity after the passage of the Menominee Termination Act (note 8, *infra*) and constituted a tribe, band or other identifiable group of American Indians for the purpose of suit in this court.

[4] Treaty of St. Louis, 7 Stat. 153 (1817).

the United States in exchange for about 600,000 acres west of the Mississippi River.[5] It had been agreed in the last of these treaties that the Menominees could inspect the western land before moving to it. When they found it unsatisfactory and refused to move, they were ceded 276,480 acres of land along the upper Wolf River in northeastern Wisconsin in exchange for the 600,000 western acres.[6] This reservation was conveyed to the Menominees "for a home, to be held as Indian lands are held. * * *" It is about 95 percent forested.

The last described land[7] thereafter remained intact, unallotted, and wholly-owned by the tribe until conveyed by the Secretary of the Interior in 1961 to Menominee Enterprises, Inc., as later described. Conveyance was pursuant to the Menominee Termination Act[8] which is at the core of this case. Prior to termination of federal supervision, fee title to the Menominee Reservation had been held by the United States in trust for the benefit of the Menominees, whose affairs and properties were managed in the manner typical of fiduciary relationships.

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[5] First by the Treaties of Prairie des Chiens, 7 Stat. 272 (1825) and Butte des Morts, 7 Stat. 303 (1827), they settled certain boundary questions. Then by the Treaty of Washington, 7 Stat. 342 (1831) and 7 Stat. 405 (1832) they ceded 3 million acres to the United States. Thereafter, they ceded about 4,184,000 acres to the United States by the Treaty of Cedar Point, 7 Stat. 506 (1836) and finally in 1848 by the Treaty of Lake Pow-aw-hay-kon-nay, 9 Stat. 952, ceded the balance of their land consisting of approximately 4 million acres. This last cession was in exchange for the approximately 600,000 acres west of the Mississippi referred to in the text.

[6] The exchange was legalized by the Treaty of Wolf River, 10 Stat. 1064-65 (1854), amending the 1848 Treaty of Lake Pow-aw-hay-kon-nay.

[7] Except for about 46,000 acres ceded by the Menominees in 1856, 11 Stat. 679, for use by the New York Indians.

[8] 25 U.S.C. §§ 891-902.

II. History and Background of the Menominee Termination Act

The history underlying the Menominee Termination Act is of singular importance to these cases because of the claims predicated in whole or in part on breach of the Government's fiduciary duty in its relationship to the tribe, and its acts and omissions in the course of terminating that relationship.

In 1947 an unrelated investigation was initiated by the Senate Commerce Committee on Civil Service to consider how the personnel and expenses of the Indian office could be reduced. It was in the course of that investigation that the Acting Commissioner of Indian Affairs presented a program designed to achieve gradual withdrawal of federal control and supervision over Indian affairs by his office. Taking such factors into consideration as a tribe's degree of acculturation,[9] economic conditioning, willingness to dispense with federal aid, and the willingness and ability of the state within which the tribe was located to assume certain responsibilities, the Acting Commissioner proposed the early cessation of federal supervision over 10 tribes. The Menominee was one of those tribes. This appraisal and proposal by the Bureau of Indian Affairs was made without prior study or investigation. Unrebutted expert testimony presented by plaintiffs at trial established that the Menominee Tribe did not

[9] Acculturation is defined in *Webster's New Collegiate Dictionary* (1961 ed.) as: "The process of absorbing new cultural traits, especially by transference from another group or people." Acting Commissioner Zimmerman considered the "acculturation" test to include such factors as admixture of white blood, percentage of illiteracy, business ability, acceptance of white institutions, and acceptance of the Indians by whites in the community.

meet any of the criteria for termination proposed by the Acting Commissioner of Indian Affairs.

Although a bill was introduced later in 1947 to terminate federal responsibility over the Menominee Reservation, it failed of passage on that occasion and it was not until some years later that termination again became an issue in Congress.[10] One of the events which precipated a renewal of interest in termination was the settlement in July 1951 of a suit which had been brought 15 years earlier by the tribe. The suit had covered a variety of matters including the ownership of certain swamp lands within the Menominee Reservation, also claimed by the State of Wisconsin; the Government's mismanagement of tribal funds; the mismanagement of the tribal forest; and the mismanagement of the tribal mills enterprise. It resulted in judgment in favor of the Menominees in the amount of $8,500,000.[11]

Per capita distribution of the award (or even part of the award) was, however, frustrated by the jurisdictional act under which the claims had been brought.[12] Individual members of the tribe urgently needed and wanted their individual shares, and as a result the tribe sought congressional authorization for a per capita payment to each member. But the Department of the

[10] On August 1, 1953, H.R. Con. Res. 108, 67 Stat. 3132 declared "termination" to be Government policy "at the earliest possible time." The Menominees were listed among the Indians covered by the resolution. It was declared to be the sense of Congress that all offices of the Bureau of Indian Affairs, the primary purpose of which was to serve any Indians freed from federal supervision, should be abolished. The Secretary of the Interior was admonished to report not later than January 1, 1954 "his recommendations for such legislation as, in his judgment may be necessary to accomplish the purposes of this resolution."

[11] *Menominee Tribe v. United States*, 119 Ct. Cl. 832 (1951).

[12] Section 7 of the Act of September 3, 1935, 49 Stat. 1085.

Interior refused to recommend passage of any per capita bill until a comprehensive termination plan had been completed.[13] As a consequence of a clear indication from Indian Bureau officials that Congress was seriously moving towards the complete elimination of the Indian Bureau, coupled with the inability of the tribe to secure a per capita payment without a completed and comprehensive termination plan, the members were under strong and immediate economic pressure to develop a program directed toward termination of federal trusteeship, whether they wanted it or not. Accordingly, in January 1953, the General Council of the Menominees adopted a resolution asking the Federal Government to authorize the transfer to the tribe of supervision of various matters then under Government control. A month later, then Congressman Melvin A. Laird introduced H.R. 2828, which authorized a per capita payment of $1,500 to the Menominees. The bill passed the House, but was delayed in the Indian Subcommittee of the Senate Committee on Interior and Insular Affairs by its chairman, Senator Arthur V. Watkins. Chairman Watkins wanted a commitment from the tribe that it would agree to complete withdrawal of federal supervision.

As hereinafter summarized, Congressman Laird's simple proposal for a $1,500 per capita payment was eventually converted into the Menominee Termination Act, largely through the efforts of Senator Watkins. Back in 1947, he had held subcommittee hearings on the withdrawal of federal services and protection

[13] H.R. 7104 and S. 2969, providing for a $1,000 per capita payment had been introduced in Congress, but they failed to pass due in part to lack of support from the Department of the Interior.

from Indian tribes, and he had developed a strong and continuing position in favor of termination. His views were forcefully expressed at the subcommittee hearings which he chaired. Senator Watkins equated termination with "freeing the Indians" and he referred to the termination program as a "freedom program." The Senator also characterized termination of federal supervision as "Removal of Restrictions Over Indian Property and Person."[14] Under his leadership, the Laird bill was rewritten essentially into a termination bill, the proposed revisions being worked out with the Bureau of Indian Affairs.

The Senator was invited to explain his views regarding termination to the tribe, and in June 1953 a meeting of the Menominee General Council was held for that purpose. This meeting is cited by plaintiffs as indicative of the degree of coercion and influence exerted upon the tribe by the Government, and specifically by Senator Watkins, in an effort to persuade its members to accept termination of federal supervision. The minutes of the June 20th meeting clearly show that Senator Watkins was adamant in his view that termination was the best policy for all concerned, and that the Federal Government had to extricate itself from involvement in Indian affairs.

The earlier mentioned recovery of $8,500,000 by the tribe in its suit against the United States, served only to strengthen Senator Watkins' position that "apparently the Government has done such a bad job that it wants out of the business." The $1,500 per capita payment, already approved by the House, was interwoven with

[14] As later illustrated by the "Menominee Deed Restrictions" case (No. 134-67A, note 2 *supra*), that claim is predicated on the reimposition of restrictions on plaintiffs' property, but under state rather than federal supervision following termination of the federal responsibility.

termination to such an extent that in order for the individual members to receive payment from their own tribal funds, they had to agree to accept termination. The Senator made it clear that tribal members would be denied the $1,500 per capital distribution unless they agreed to full and unqualified elimination of federal protection, services and privileges, and took their place in the Wisconsin state governmental system on a full and equal basis with non-Indians. He stated that it was his objective to get the Government out of the Indian business. About the same time similar representations were made to tribal representatives in the course of a meeting at the Department of the Interior.

Following Senator Watkins' speech, the Menominee men and woman present at the council meeting voted 169 to 5 (in a standing vote) to accept the principle of termination. No plan of any kind nor any specifications for termination had been presented to them, nor had they been advised of the many personal, economic and political consequences which would flow from termination. It had been made clear, however, that the $1,500 per capita distribution which they needed and wanted was inextricably linked to termination and that a vote against termination constituted a vote against the per capita distribution.

Notwithstanding the vote in favor of that resolution, it cannot be regarded as an indication that the tribe favored the concept of termination. On the contrary, the record indicates that the vote was simply a product of the tribal members' urgent need and desire for the per capita payment. The debate which took place prior to the vote illustrates that members were convinced that they could obtain approval of the per capita payment only by voting in favor of the resolution. Evaluated in light of the atmosphere in which the vote

was taken, it evidenced anything but an approval of the termination proposal. Thereafter on July 15, 1953, the Senate Committee on Interior and Insular Affairs amended the Laird bill by changing the main thrust of the bill from one authorizing a per capita distribution, to one providing "for orderly termination of federal supervision over the property and members of the Menominee Indian Tribe of Wisconsin."[15] The $1,500 per capital distribution which had been the tribe's initial and sole interest, was included almost incidentally as section 6 of a termination bill.

Two days after the Watkins amendment, a special meeting of the Menominee Advisory Council was called. The chairman had become alarmed upon learning of all the implications of the Watkins bill and had conveyed his concern to the membership, urging all to attend. At an exceptionally well-attended meeting, the question presented was: If you favor rejection of termination now even though it means that you will *not* receive a per capita payment from the tribal funds, please stand. One hundred ninety-seven stood, and none opposed rejection of termination.[16] However, this vote at the tribal council meeting had no appreciable effect on the Congress. The amended bill passed the Senate on July 24, 1953.

On March 10, 1954, the Joint Committee on Indian Affairs met on the question of Menominee termination and conducted 3 days' of hearings.[17] In conference following the hearings it was the Watkins bill which was

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[15] S. Rep. No. 590, 83d Cong., 1st Sess. (1953).

[16] At a meeting of the Advisory Council only members of the council can register an official vote, although tribal members in attendance may be asked to register their vote so that the council can be aware of their opinion, and be guided accordingly.

[17] On the third day, Senator Watkins was the only one present on behalf of the joint subcommittee.

essentially adopted. Although the House rejected the conference report and although further conferences were required, the bill which eventually reached the Congress was the Watkins bill, with a modification of the time schedule for final withdrawal of federal services. This was the bill which was eventually enacted as the Menominee Termination Act.[18]

Briefly summarized, the Act closed the rolls of the Menominee Tribe as of the date of its enactment; authorized a $1,500 per capita distribution to each enrolled member; authorized the tribe to retain at its own expense (under contracts approved by the Secretary) the services of management specialists to assist in studies, recommendations and reports to carry out the terms of the Act, by December 31, 1957; required the tribe to prepare a plan for future control of tribal property and service functions on the reservation; declared that (unless an earlier date was agreed upon) the responsibility of the United States on the reservation would terminate December 31, 1958; provided for transfer on that date to the tribe of all property theretofore held by the Government in trust for the tribe; exempted the initial distribution from federal and state income taxes; provided that with the transfer of tribal property, all federal services would cease and all federal laws affecting Indians would cease to be applicable to the Menominees who would thereafter be subject to state laws; and provided that the interests of minors and legal incompetents were to be protected by the Secretary by such means as he deemed adequate.

Subsequently, the Act was amended on four separate occasions, first to authorize reimbursement to the tribe for funds expended for management specialists, tax

[18] Public Law No. 83-399, June 17, 1954; *see* note 8 *supra*.

consultants and others retained to assist in carrying out the purposes of the Act;[19] then to require a final tribal plan to be formulated and submitted for approval by December 31, 1957, said plan to provide for protection of the forest on a sustained yield basis, and assure protection of the water, soil and wildlife;[20] then to postpone the date for submission of a tribal plan from December 31, 1957 to February 1, 1959, and the final termination date from December 31, 1958 to December 31, 1960, and to provide further that upon failure to submit a tribal plan by February 1, 1959, the Secretary of the Interior could cause such a plan to be prepared, and authorizing him to transfer tribal property to a trustee of his choice for "management or disposition" for the benefit of the tribe;[21] and finally to extend the termination date to April 30, 1961, provided that the Secretary was required to transfer tribal property to a trustee of his choice on March 1, 1961 if a tribal corporation was not functioning by that date.[22]

As required by Section 7 of the Act, the Menominee Tribe had submitted its plan to the Secretary of the Interior on January 26, 1959, contingent upon requisite action by the Wisconsin State Legislature. State action

[19] Act of July 14, 1956, 70 Stat. 544.

[20] *Idem*, 70 Stat. 549. The Act stated in this regard: "The sustained yield management requirement contained in this Act * * * shall not be construed by any court to impose a financial liability on the United States." The intent of the quoted sentence is an issue in one of the subsequent related cases.

[21] Act of July 2, 1958, 72 Stat. 290. This amendment also appropriated a sum to reimburse the tribe in part for its expenditures in carrying out the purposes of the Act, and for half such expenditures (not exceeding $275,000) thereafter.

[22] Act of September 8, 1960, 74 Stat. 867. Actual termination of federal supervision was accomplished by Proclamation of the Secretary of the Interior on April 29, 1961.

was required because one of the features of the plan could be implemented only by state legislation, namely, the creation of Menominee County, Wisconsin, out of the Menominee Reservation. Under the plan, the Menominee Reservation was to become both Menominee County and the Town of Menominee within the State of Wisconsin, with some town and county officials serving in the same capacity for both governmental entities. Menominee County was to be attached to adjacent Shawano County for judicial functions, and to the office and functions of Shawano's Superintendent of Schools. The plan submitted was finally approved some 2 years later, and on April 29, 1961, it was published in the *Federal Register.*[23]

A Wisconsin corporation, Menominee Enterprises, Inc. (MEI) was incorporated under state laws to accept title to and manage all property and assets of the Menominee Tribe, the stock of MEI to be held and managed by a voting trust for the benefit of all stockholders issued voting trust certificates. A trust certificate representing 100 shares of stock was issued to each of the 3,270 enrolled Menominees,[24] except that certificates of minors and/or incompetents were issued to the First Wisconsin Trust Company (one of the plaintiffs herein) to be held for their benefit. Each enrolled member was also to be given a $3,000 income bond which could be used for the purchase of a homestead or farm property from MEI. The bonds could not be sold for a 3-year period, and at the end of that time MEI had an option to meet

[23]The difficulties encountered and conditions imposed in working out the plan with the requisite state approval, are detailed later in the opinion. Also, *see* note 14 *supra.*

[24]As shown on the final membership roll, approved and published in the *Federal Register* pursuant to Section 3 of the Act.

bona fide offers. MEI was governed by its board of directors, consisting of nine members, at least four of whom were to be members of the Menominee Tribe.

On April 26, 1961, the Secretary of the Interior transferred to MEI, title to all real property theretofore held in trust by the Government for the Menominees. One of the amendments to the Act[25] mandated a plan providing for sustained yield management of the tribal forest, as did a corresponding and specific state statute conditioning a special method of taxation of these forest lands upon a sustained yield restriction imposed by federal law. Accordingly, the deed transferring the Menominee Forest lands to MEI contained the following restrictive language:

> ***THE PARTIES HERETO MUTUALLY COVENANT and agree for the benefit of the State of Wisconsin as follows:
>
> 1. That the lands conveyed hereby shall be operated on a sustained yield basis until released therefrom under the laws of Wisconsin or by act of Congress.

At the insistence of the State of Wisconsin, the deed contained the following additional restriction:

> 2. That for a period of 30 years commencing with the date of this deed the ownership of lands conveyed hereby shall not be transferred, nor shall such lands be encumbered without the prior consent of the State Conservation Commission of Wisconsin and approval of the Governor of Wisconsin unless released from sustained-yield basis under the laws of Wisconsin.[26]

[25]*See* note 20 *supra.*

[26]These provisions are the bases for the "Menominee Deed (Forest) Restrictions" claim mentioned at notes 2 and 14 *supra.*

III. Opposition of the Menominees to Termination

The commencement and completion of the above-described proceedings to terminate all federal supervision over the Menominees is attacked herein as a fundamental breach of a fiduciary duty owed by defendant to plaintiffs. Plaintiffs further assert that any apparent consent to termination on the part of the tribe or its members was procured by coercion. The circumstances preceding termination have been briefly recited above in tracing the history and background of the Menominee Termination Act. They are further elaborated upon in this section of the opinion. Plaintiffs cite the Senator Watkins meeting with the General Council, at which the Senator insisted on combining termination with the per capita payment the tribal members individually needed and wanted.[27] Other evidence of record supports a finding that no effective consent to termination was ever given by the tribe. In fact, the record indicates that most tribal members were opposed to termination. Congressman Henry S. Reuss of Wisconsin testified at subcommittee hearings that:

> *** On several occasions the Tribe was told by representatives of the Federal Government that unless they agreed to termination on the Federal Government's terms, they could not have the

[27]At that meeting in June 1953, the Senator stated, *inter alia:* "You had a just complaint and you brought suit against the United States, and one of the complaints was that the United States mismanaged your lands and property to the extent that you suffered damages in the amount of $8,500,000; * * *

[I]t would be good to get rid of Uncle Sam because he cannot possibly do the job."

> $1,500 made available to them and to their credit in the U.S. Treasury.[28]

Other concerned Government officials and social scientists had similarly observed and drawn attention to the strong opposition of the Menominees to termination. The Indian Bureau's superintendent for the reservation reported in letters to the Commissioner of Indian Affairs:

> ***[T]he Menominees, or at least their leaders, are violently opposed to withdrawal and have repeatedly stated in meetings "[t]he Government and Congress want withdrawal, now let them do it as we don't want any part of it.

He also stated that: "I question very much whether we are going to be able to 'Sell' the Menominees on the Withdrawal Program." The Bureau's Program and Administrative Officer similarly reported that:

> *** We are experiencing non-acceptance, resistance and a considerable bewilderment, irritation and conflict among the Menominee people. *** Almost no one wants withdrawal and most are seriously confused.

The Chairman of the Menominee Advisory Council wrote that "[w]e all know that there will be a movement *** to ask the new Federal administration and the Congress to reconsider the advisability of termination."

Dr. Gary Orfield, a political scientist, wrote and testified at congressional hearings that Senator Watkins had secured passage of a harsh termination bill and that

[28]He cites the June 5, 1953 meeting in the office of the Secretary of the Interior, and the June 20, 1953 meeting on the reservation with Senator Watkins, Chairman of the Senate Subcommittee on Indian Affairs. Wisconsin State Senator William F. Trinke also expressed the opinion "* * * that termination was procured by coercion."

no one in the tribe had the faintest idea of the implications of termination. He testified:

> The BIA made no explanation of the context within which the tribe had voted. The decision of 200 people (actually, only 174) who needed money, and who were told that termination was coming anyway, and who hadn't the least understanding of the implications of termination, was taken as the considered judgment of the entire tribe. *** There is no evidence that the majority of the Menominee people favored termination at any time. *** The termination act was based on a series of false assumptions.

Dr. David Ames, an anthropologist sent to the reservation by the State of Wisconsin, Dr. Robert B. Edgerton who spent the summer of 1959 on the reservation, and Dr. Verne F. Ray, anthropologist and ethnohistorian, were all of the same opinion. In 1958, the Secretary of the Interior declared that no tribe would be terminated unless a clear majority of its members agreed. He also noted that a clear majority of the Menominee Indians neither accepts nor understands termination and he queried how it was possible for termination to come to an Indian people without a tribal referendum.

Although the opposition of the Menominee Tribe appeared at times to be directed more toward the short time frame in which it was to be accomplished than toward the concept of termination itself, it is clear from the record that the members were fundamentally opposed. That opposition was effectively neutralized by the statements and actions of Senator Watkins; by the need of the Menominees for the per capita distribution; by misunderstandings as to the full implications of termination; and by the innocent conviction that if termination when tried proved undesirable, it would be repealed.

Later, when the character and practical implications of termination came to be better understood, tribal opposition intensified. The feeling against termination was so strong in 1960 that the Menominees repudiated their leaders and charged them with the failure to stop termination and return the tribe to federal supervision. A petition was circulated and signed by 600 members seeking outright repeal of the Termination Act. Many members reacted by boycotting tribal meetings because non-attendance had been a traditional expression of negative opinion.

The State of Wisconsin was also strongly opposed to termination, and encouraged and supported the Menominees in their opposition, contending that an appearance of tribal consent had been obtained by duress. Perhaps the clearest indication of the prevailing mood of the Menominees is a resolution passed by the State of Wisconsin shortly before the final termination deadline, which stated:

> RESOLVED BY THE SENATE (the Assembly concurring), that the legislature of the State of Wisconsin requests the Congress of the United States to repeal or amend Public Law 399 *** so as to retain and continue indefinitely federal supervision *** until such time as the Menominee Indian tribe has achieved a status comparable and equal to the average citizen of its environs *** *and until the tribe has initiated a request for termination of tribal status and such request has been approved by an official vote of the enrolled members of the tribe.* *** [Emphasis supplied.]

Viewed as a whole, the record confirms that the Menominee Tribe did not voluntarily consent to the implementation of a policy of termination. Rather, the plaintiffs' eventual acquiesence was a result of their desire

to obtain the sorely needed per capita payment, coupled with the sense of resignation that termination was inevitable regardless of what position the tribe took. In order to make some contribution to the form that termination would take, rather than have some other body do all the necessary planning, the tribe appeared to be resigned to termination.

It is concluded on this record that the tribe was not in favor of termination, and did not voluntarily consent to its implementation.

IV. Inadequacy of Measures Taken to Prepare the Menominees for Termination and Management of Their Own Affairs

Plaintiffs further contend that the tribe was not adequately prepared for the consequences of termination, and that defendant failed to take necessary steps to remedy that condition. The entire burden of securing and evaluating studies deemed necessary for implementation of termination was placed on the uncertain and inexperienced tribal members who were themselves the subjects of the proposal and of the necessary studies. Furthermore, the Act initially had required that payments for the studies would not be made entirely from the tribal funds, as made available by the Secretary,[29] and this also had an inhibiting effect on the initiation of such studies.

The scope of the problem of preparing a people for independence, after decades of dependency on the Government, was beyond the comprehension of the tribe. Working toward an effective solution required far greater expertise and knowledge than was available within the

[29] As earlier described, amendments to the Act in 1956 and 1958 authorized partial reimbursement to to tribal funds for these expenditures.

tribe itself. The Government's position throughout the termination period was that it stood ready to lend assistance whenever specific aid was requested, but this presupposed that the tribe could identify and understand the scope of its problems, and that it could formulate the necessary questions and requests for aid that it required. In practical application this also presupposed that the tribe would be able to organize a program under which planning for termination could proceed. That supposition was clearly not warranted.

As a result, the necessary studies were not even initiated until over a year following passage of the Act. Congressman Reuss, for example, was alarmed by the provision that the Menominees would be (as he put it) "shoved out on an out-you-go-ready-or-not basis" whether or not an acceptable plan could be devised during the 4 years allotted for an after-the-fact study. The Acting Commissioner of Indian Affairs acknowledged that the Bureau had failed to explore a number of problems growing out of termination, such as hunting and fishing rights, status of the tribal court, stumpage payments, and the fate of tribal enterprises such as the hospital, welfare payments and conduct of the schools.

All cognizant officials at the federal and state level were aware of these problems, and the Indian Bureau had compiled substantial relevant data over the years, but these data and assistance from the Bureau were not forthcoming during the termination period, probably because Bureau functions were contracting during the same period.[30] As a result, studies were left to the Menominees, or to the State of Wisconsin, which had

[30] Six months after the Act was passed, the Bureau cut its local staff by over 50 percent. That had been the underlying spur to termination legislation. The Bureau immediately began to transfer its functions to the Menominee Indian Advisory Council.

conflicting interests at many points. The Menominees had for the preceding century been closely supervised, directed and controlled by the Bureau, and were trained to dependency. The local program officer for the Bureau observed that the Menominees reacted with uncharacteristic "anxiety" and with "bewilderment, irritation and conflict." His prepared analysis concluded that more than "administrative skill" was required, namely, "people expertly trained in the field of social science" conducting "sound social studies." There can be no doubt that defendant's representatives were aware of the need for in-depth studies, but the Commissioner of Indian Affairs rejected this advice on the grounds that funds for such research had already been obligated, and that necessary training of the Menominees could be accomplished by an "adult education program."[31]

In 1955, the Wisconsin legislature created the Menominee Indian Study Committee (MISC) in recognition of the need for decisions on the social, civil and local governmental needs of the Menominees. It was created in response to a request for help by the Menominee Advisory Council directed to the state and the University of Wisconsin. Because MISC was not created nor organized to act until a year or two after termination, its research was not concerned with whether or not termination should take place, but rather toward what to do about it,

[31] The "adult education program" did not serve its purpose because the majority of the Menominees had insufficient experience, training, and understanding to absorb the material offered and dropped out of class. The Government had long established an anthropological division in the Bureau of Indian Affairs and was aware of the usefulness of applied anthropology in bridging cultural shock. Anthropologists had testified on the dangers and difficulties attendant upon a policy of termination of federal trusteeship over Indians.

assuming it to be an accomplished fact. MISC's membership of 14, consisted of three Menominees, representatives of each of the two counties within which the reservation was contained, six members representing the Wisconsin departments concerned with taxation, public welfare, public instruction, highways and conservation, one state senator, two assemblymen, and the state attorney general. Its studies of transition problems were in part financed by tribal funds. Its responsibility was to develop legislative proposals.

The state legislature did eventually adopt a series of statutes creating a Menominee County coterminous with the reservation and transferring the tribe and its activities from federal to state auspices. The new laws were to become effective on the date of publication of an acceptable termination plan,[32] but only if that plan contained the deed restrictions above quoted.[33]

Being a state committee, MISC was clearly state-oriented, and it was further handicapped in assisting the Menominees by the narrow question to which it was directed, namely, what to do about termination, taken as an assumed fact. As a result, the committee members examined the Menominee problems within the confines of their customary governmental operations. The Menominees constituted less than 1 percent of Wisconsin's population and were not regarded as holding any special rights by reason of treaty provisions or trusts status as had been the case under federal supervision. As a result, MISC tended to ignore the human and social problems of termination in favor of pragmatic "housekeeping"

[32] Which occured on April 29, 1961.

[33] At note 26 *supra*.

considerations, with the state's interests uppermost in mind.[34]

On advice from the State University Advisory Committee, the Menominee Advisory Council organized its own special study group called the Coordinating and Negotiating Committee. That group eventually submitted a tribal plan which was then reviewed by MISC.[35] In short, there was an abdictation of responsibility in preparing the Menominees for the manifold problems of termination which had been thrust upon them. The wards in this protective trust relationship were in practical effect left to their own devices. Instead of increasing assistance during a difficult transition period, the Indian Bureau began to withdraw the services it had traditionally provided prior to termination.[36]

By way of illustration, the Menominees were in effect left in the middle between federal and state governments,

[34]The Chairman of the University of Wisconsin Advisory Committee stated that "[t]he job of the Menominee Indian Study Committee was to keep the heat on the Tribe to come to their own decision." Yet these were decisions which the professionals themselves deemed extraordinarily complex. As MISC subsequently reported: "Failure to evolve a satisfactory plan (for termination of the Menominee Tribe) would result in disaster as to the best interests of the State of Wisconsin."

[35]Spokesmen for the university and state committees explained that: "The omnibus plan is large and complex * * * the issues and problems many. * * * We must frankly confess to have done little better than to have skimmed the surface on these problems."

[36]Dr. Verne F. Ray, anthropoligist and ethnohistorian, and plaintiffs' principal witness concluded: "Had the United States properly carried out its obligation, as initiator of the idea of termination and as trustee for the tribe, its far greater competence in research and analysis would undoubtedly have resulted in complete abandonment of the termination project.

neither of which was prepared nor disposed to treat with the problems of termination. At a time when they were still under federal supervision and protection (July 16, 1959) the Secretary of the Interior sent them the following telegram:

> Reurtel July 9 concerning state legislative proposal for thirty year restrictive convenant on sale Menominee Forest property, we think proposal unfair in discriminating against Menominee property rights in manner not applied to other Wisconsin citizens. In answer your specific query does Secretary have right to do this, we believe we can but we would do so reluctantly only because you appeal that it is only way Menominees can get state legislation they want. Also it is in *** accord with desire of all parties that forest be retained in Menominee ownership with maximum benefits from sound conservation practices. We will incorporate a proper restrictive sale convenant in the deed provided Menominees give their consent ***.

V. The Menominees Were in Fact Unprepared for Termination When it Occurred

Because of a widespread awareness of the foregoing circumstances, there was general agreement among federal and state officials and concerned social scientists that the Menominees were in fact socially, culturally, economically and politically unprepared for termination as scheduled. Congressmen Laird and Reuss and state senators Trinke and LaFave publicly expressed their opposition to termination. In adjoining Shawano County, officials directed the following resolution to Congress:

> *** WHEREAS, the State of Wisconsin, Shawano and Oconto Counties were not considered by the Congress in the passage of Public Law 399 [the termination bill] and only one hundred fifty Meno-

minee Indians from a tribe of over three thousand attended the meeting of the tribal council which considered the acceptance of the terms of Public Law 399,

BE IT RESOLVED *** that [the senators and congressman addressed] *** be requested ***

1. To introduce immediate legislation to repeal Public Law 399 in its entirety.

Social science witnesses cite the inconsistencies in defendant's position that the Menominees were ready to exercise the rights and responsibilities of other American citizens in governmental matters, but thereafter were to be closely circumscribed in the management of their valuable forest, as if they were still wards incapable of exercising those rights and responsibilities. They felt that the Menominees were far from being fully acculturated in many of the spheres most critical to successful entry on an unlimited and unrestricted basis into the world of Wisconsin whites. During a long period of reservation life they had developed a special system of values and expectations. Not having been accustomed nor permitted to make decisions of their own, they had grown to expect a wide variety of services without charge. There were things more important to the Menominees than money, and there was a general apathy toward tribal government. The individual standard of living was low, and there were no local business leaders. The Menominees did not possess the skills and experience necessary to run the timber operation and a local government. Nothing during the preceding century had prepared them for modern politics.

The Menominees were totally unprepared for an allotment of tribal lands to individuals and families. They had rejected the policy enunciated by the Allotment Act of 1887 which contemplated that with the assignment of

individual homesites, the Indians would turn to agricultural pursuits and tribal bonds would be weakened. Thus they had gained no experience over the years in the handling of land as a private possession, and they equated allotment with "losing" their community land. This fact had not been taken into consideration in selecting tribes suitable for termination. Communal ownership had been an essential and traditional cultural value of the Menominees. Each individual had use rights in all tribal property, and held no piece of paper evidencing ownership of a particular parcel. After termination, each individual was required to purchase a parcel from MEI in order to have title to it and to his home. The reaction was suspicion and distrust of the termination proposal and of the tribal leaders.

Problems growing out of a lack of formal education outside the reservation as well as language problems also confronted the Menominees as they approached termination. Some Menominees in middle age had to have termination explained through interpreters. Although Menominee children were then progressing as high as the eighth grade before discontinuing their studies, the older tribal leaders charged with decisionmaking had not even reached that modest level of schooling. Upon leaving school a Menominee still knew little about typical non-reservation life in Wisconsin, and almost nothing about business. Their sawmill had been run by white employees of the Indian Bureau, paid by the Menominees, and they had been excluded from the better paying managerial, supervisiory and skilled positions in their own enterprise.

Other cultural and economic shocks awaited the Menominees after termination. The reservation system had bred distrust and poor relationships between the Menominees and non-Indian residents in adjacent counties. Termination resulted in a loss to the Menominees

of their local doctor and hospital. The Governor's Commission on Human Rights reported that less than 5 percent of the tribal children had adequate diets, and the number of Menominees receiving some public assistance was six times the state average.

VI. Actual Impact of Termination Upon the Menominee Cash Balance, Other Assets, and Way of Life

When the Act was passed, the Menominees had a balance in the U.S. Treasury of $9,960,895.[37] Shortly thereafter the $1,500 per capita distribution reduced that balance by $4,905,000. It was further reduced by $2,268,240 in September 1955 to correct improper computation of per capita payments made to reflect the fair market value of timber previously cut from the reservation, commencing back in 1941. The Department of the Interior reported on February 24, 1956 that in less than a year's time, the Menominee balance had shrunk to $2,150,000. The report further indicated that cash receipts during the preceding year had not covered tribal obligations and it concluded that federal funds were required for roads, schools and adult education. The report did not, however, suggest reconsideration of the Menominees' supposed "readiness for termination."[38]

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[37]This cash balance had been one of the primary factors in selecting the Menominees for termination.

[38]The Chairman of the Menominee Tribal Council testified before the House Subcommittee on Indian Affairs in February 1956, that the tribe had sustained losses in the fiscal years 1952 through 1955. And the Acting Commissioner of Indian Affairs had testified at the same hearing that circumstances had changed since the Act had come under review. He urged the subcommittee to reconsider the situation.

Right after termination, the Menominees lost their hospital because it failed to meet state standards. On July 27, 1960, just prior to termination, the Menominee General Council passed a resolution addressed to the Secretary of the Interior, charging negligence in connection with a recent remodeling of the hospital at a cost to the tribe of $250-$350,000. Ten violations of the state building code were cited. But on May 11, 1961, the Acting Commissioner of Indian Affairs rejected the resolution on the grounds that it had not been the intent of the Menominees, when they were still wards of the defendant, that the remodeling undertaken by the Bureau comply with state requirements. Compliance would have been too expensive, it was stated.

Conditions continued to deteriorate. In January 1965, the Menominees summarized for MISC, developments in the 4 years following termination. The report cited an inadequate tax base; the high cost of tubercular incidence; the high ratio of welfare and correction costs to income; lack of adequate job training; and school dropouts and deliquency. Property tax bills and bond interest were regularly exceeding earnings from the mill. Efforts to bring new industry into Menominee County had failed because the already high property taxes were increasing, and because local labor was inadequately trained and local support facilities were lacking.[39]

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[39]In March 1965, Senator Proxmire reported to the Senate "that the consequences [of termination] for this Wisconsin tribe have been very bad, in spite of the fact that the state of Wisconsin and its university has tried to help the Menominees. The Menominees have suffered greatly. They are poor. Many are unemployed. The health of these Indians has suffered seriously." He added: "This is a Nation which at one time controlled a large portion of

[footnote continued]

In a report in 1965 the Indian Bureau joined with the Governor of Wisconsin and its senators in reporting this deteriorating condition and the Bureau flatly stated to the House Appropriations Committee that termination had been "ill advised."[40] These conditions were predictable. They had in fact been predicted. Governor Gaylord Nelson appealed for financial aid to the Chairman of the Senate Subcommittee on Indian Affairs, noting that:

> The present economic problems on the reservation resulting from the health, education and welfare problems are a consequence of the pre-termination situation. As Attorney General John W. Reynolds pointed out in his testimony before the Senate Subcommittee on Indian Affairs, one cannot take people out of an institution in which they and their forefathers have lived all of their lives and then claim that the operator of the institution has no responsibility for what happens to them thereafter.

The new management at MEI had inherited a 50-year old plant, without needed improvements. At the same time, it had assumed responsibility for providing all governmental services in the face of exhausted capital reserves required for investment. The individual Menomi-

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Wisconsin, and with which we made a treaty under which one small primeval area of Wisconsin was to remain as their territory." Declaring that "this proud tribe is gradually and painfully disintegrating," the Senator drew attention to the fact that the average Menominee family of five subsisted on an annual income of $2,300; one out of seven was on welfare; and a third were subsisting on federal food surplus distributions.

[40] The BIA report concludes that Menominee County was the smallest and poorest in Wisconsin and that Menominee County had become a "pocket of poverty" following the termination of federal services and supervision.

nee was surprised to find that he was now required to pay market value for the individual parcel of land he occupied, but was without the cash to buy it, with the result that individual MEI income bonds were being surrendered in lieu of cash. MEI was essentially controlled by non-Indians, and as it struggled for survival it initiated management policies which the Indians found it difficult to accept. As a result, severe tensions developed between the tribe and its own representatives in MEI.[41]

Individual Menominees had no prior experience in paying for taxes, health care, utilities and other services formerly provided by the community. As a result, some families suffered a discontinuance of water and electrical services, and some were in danger of losing their homes. Many were surprised and outraged when the state ruled in 1962 that game laws were to be enforced in Menominee County. Menominee treaty rights were eventually confirmed, but only after litigation carried to the U.S. Supreme Court.

As the result of the foregoing conditions, as further detailed in the findings, the President on July 8, 1970, urged repudiation of House Concurrent Resolution 108 (August 1953) to the effect that termination was the long range goal of the Congress. The President stated that the policy was wrong and based on false premises. He explained:

> Termination implies that the Federal government has taken on a trusteeship responsibility for Indian communities as an act of generosity toward a disadvantaged people and that it can therefore discon-

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[41] For example, when MEI decided to dispose of the Menominee electric plant to Wisconsin Power and Light, tribal members unsuccessfully sought an injunction to halt the sale.

tinue this responsibility on a unilateral basis whenever it sees fit. But the unique status of Indian tribes does not rest on any premise such as this. The special relationship between Indians and the Federal government is the result instead of solemn obligations which have been entered into by the United States Government.

Down through the years, through written treaties and through formal and informal agreements, our government has made specific commitments to the Indian people. For their part, the Indians have often surrendered claims to vast tracts of land and have accepted life on government reservations. In exchange, the government has agreed to provide community services such as health, education and public safety, services which would presumably allow Indian communities to enjoy a standard of living comparable to that of other Americans.

This goal, of course, has never been achieved. But the special relationship between the Indian tribes and the Federal government which arises from these agreements continues to carry immense moral and legal force. To terminate this relationship would be no more appropriate than to terminate the citizenship of any other American.[42]

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[42]Post-trial briefs cite the Menominee Restoration Bill (H.R. 10717) which passed the House on October 16, 1973 by a vote of 404-3. It would reestablish federal supervision over the Menominee Tribe, reinstitute tribal self-government and restore the protection of a trust relationship with respect to tribal property. Debate on the bill further demonstrated that Menominee "consent" to termination had been forced. The Assistant Secretary of the Interior wrote the chairman of the committee in support of the bill that: "* * * funds coming to the Menominees were to be held hostage until termination was agreed to. Thus the Menominee termination can be viewed as an instance of 'forced termination,' a policy which the President soundly rejected in his Indian message of July 8, 1970."

[footnote continued]

VII. Conclusions

The unique relationship between the Government and the Indians has long been judicially recognized.[43] It has been compared to that of guardian to ward, or trustee to *cestui que trust.* Accordingly, the conduct of U.S. representatives in the course of that relationship has always been judged by the most exacting fiduciary standards. The fiduciary duty assumed by the Government imposes upon it the obligation to act at all times with the Indians' best interests uppermost in mind, and to exercise prudence and good faith in the control and management of Indians properly within its trust.[44] The duty of care owed is especially high when the Govern-

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In the course of debate, Congressman Meeds referred to "an element of coercion" in citing Senator Watkins' meetings with the Menominees; and Congressman Haley expressed relief "that the misleading information that these Menominees received did not come from this side of the House." Congressman Saylor observed that "we come today to the final chapter of a tragedy that was authored in the other body 19½ years ago. The bill before us, H.R. 10717 is not a panacea nor a permanent solution to the problems of the Menominee Tribe of Indians, nor does it undo the human suffering and economic damage imposed on these people over the past 20 years. It is not a perfect bill, Mr. Speaker, but it is a better bill than the monstrosity that was rammed through this House in 1954 as part of the mistaken 'termination policy' of those times."

[43]*United States v. Kagama,* 118 U.S. 375, 383-85 (1886); *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 15 (1831); *Arenas v. United States,* 60 F. Supp. 411, 419-20 (S.D. Cal., 1945).

[44]*Seminole Nation v. United States,* 316 U.S. 286 (1942); *Chippewa Indians v. United States,* 301 U.S. 358, 375-76 (1937); *Oneida Tribe of Wisconsin v. United States,* 165 Ct. Cl. 487, 492-94, *cert. den.* 379 U.S. 946 (1964); *Seneca Nation v. United States,* 173 Ct. Cl. 917, 925 (1965); *Menominee Tribe v. United States,* 101 Ct. Cl. 22 (1944); *Menominee Tribe v. United States,* 101 Ct. Cl. 10 (1944); *Pyramid Lake Paiute Tribe v. Morton,* 354 F.Supp. 252 (D.D.C., 1972).

ment-trustee has itself developed an interest related to the management of Indian property.[45]

In this case a specific trust relationship had long existed between plaintiffs and defendant.[46] That trust relationship continued beyond termination and until such time as plaintiffs were capable of assuming management and control of their property and assets from defendant.[47] A trustee actually has a duty to resist termination when it is inappropriate[48] and this would be particularly true where, as here, there are treaty guarantees present and entitled to consideration.

It is apparent from the foregoing detailed recital of the facts underlying termination of the Menominees that it was not in their best interests that the federal trusteeship be unilaterally ended. The Termination Act was initiated by the defendant in its own interests "to get out of the Indian business" and to reduce costs of operating the Indian Bureau. During the termination transition period between passage of the Act and its effective date, defendant made little effort to negotiate solutions to the many problems confronting plaintiffs as a result of termination of federal supervision. On the contrary, in

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[45] *Navajo Tribe v. United States*, 176 Ct. Cl. 502, 364 F.2d 320 (1966). *Also see & cf. Squire v. Capoeman*, 351 U.S. 1, 8 (1956). Note that the Government initiated termination as a means of curtailing offices of its Indian Bureau; and that it maintained a continuing interest in preserving the Menominee Forest (as a forest) for public purposes after termination.

[46] *See* treaties cited at notes 4-6 *supra*, and *Menominee Tribe v. United States*, 101 Ct. Cl. 10 at 19-20.

[47] *See* 10 BOGERT, TRUSTS AND TRUSTEES, § 1010 (2d ed. 1962) at 574. *See also, Idem*, § 1001-02 at 493 and 502.

[48] *Cf. Bay Biscayne Co. v. Baile*, 73 Fla. 1120, 75 So. 860 (1917); *Hughes v. First Nat'l. Bank in Oakland*, 47 Ca.App.2d 547, 118 P.2d 309 (1941).

amendments to the Act and otherwise, defendant gave consideration and effect to its own interests and to the interests of the state where state interests were in conflict with the best interests of plaintiffs.

Plaintiffs did not effectively consent to and were in fact opposed to termination. But even where facts are present demonstrating consent (and they are not in this instance) beneficiaries to a trust are capable of consent only after they have been exposed to a full, fair and good faith disclosure of all pertinent facts, and only if they are of full capacity.[49] A good many of the Menominees were totally unaware of the meaning and consequences of termination and lacked the capacity to give their consent to such a far-reaching measure which would have so profound an effect upon their future.

Defendant failed to properly apply the criteria that it had itself developed to determine the feasibility of termination. The Menominees did not in fact meet any of those criteria. Little if any effort was made to determine whether or not plaintiffs were in fact ready to assume management and control of their own property and affairs.

Following the ill-advised termination of the federal trusteeship, defendant failed to assist the Menominees in preparing for the problems which would inevitably follow, nor to reconsider the policy of termination, nor to adopt appropriately modified termination legislation. As a result, the Menominees were unprepared and untrained in government or industrial management to assume the extensive responsibilities which had involuntarily been imposed upon them. This had a disastrous effect upon their assets and their way of life, a result which could

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[49] 10 BOGERT, TRUSTS AND TRUSTEES, §1006 (2d ed. 1962) at 530-31.

readily have been anticipated and which was in fact anticipated. It is concluded that these circumstances constituted an abrogation of defendant's fiduciary obligations growing out of its treaty and trust relationship to plaintiffs, and that defendant's acts and omissions constitute a breach of the fiduciary duty owed to plaintiffs.

The damages issues arising out of the foregoing circumstances are considered in the separate opinions which follow.[50]

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[50] *See* note 2 *supra.*

FINDINGS OF FACT

General Background and History of the Menominee Termination Act; Relationship Between the Parties; Consequences of Termination of That Relationship

Jurisdiction

1. This action is brought pursuant to, and the jurisdiction of this court is founded upon, Sections 1491 and 1505 of the Judicial Code (28 U.S.C. 1491 and 1505).

Parties Plaintiff

2. *Tribe.* Plaintiff, the Menominee Tribe of Indians, is a recognized tribe of Indians which has existed since time immemorial, and which has always resided in what is now the State of Wisconsin. *Menominee Tribe of Indians, et al. v. United States,* 179 Ct. Cl. 496 (1967), *aff'd* 391 U.S. 404 (1968).

3. *Corporation.* Plaintiff, Menominee Enterprises, Inc. (hereinafter MEI), is a corporation organized under Chapter 180 of the Wisconsin statutes pursuant to a plan approved October 30, 1959 by the Secretary of the Interior for the future control of Menominee Indian tribal property and future service functions. In accordance with the plan, the Secretary of the Interior, following termination of his authority to supervise the tribe and its property, transferred the tribal assets to MEI. All stock ownership in MEI was issued to a voting trust, the trust to continue in existence until terminated by holders of the trust certificates. Issuance of these certificates was limited to the 3,270 members of the tribe whose names appeared on the final roll of the tribe as proclaimed on June 17, 1954.

4. *Individuals.* Plaintiffs, Gordon Dickie, James Frechette, Jerry Grignon and George Kenote, are all enrolled members of the Menominee Tribe, and stockholders of MEI.

5. *Trustee.* Plaintiff, First Wisconsin Trust Company, is a corporation, duly organized and existing under the laws of the State of Wisconsin, which was appointed trustee under the Menominee Assistance Trust to protect the rights of members of the tribe less than 18 years of age, *non compos mentis,* or otherwise incompetent. As trustee, it holds and exercises the voting rights in MEI of those shareholders who are in its trust.

The Menominee Reservation

6. The Menominee Indian Reservation, the land where the tribe and most of its members presently reside, was for the most part aboriginally owned by the tribe, and was confined to the tribe by the Treaty of Wolf River, May 12, 1854, 10 Stat. 1064. This reservation was never allotted, and remained wholly owned by the tribe until conveyed in 1961 to MEI by the Secretary of the Interior pursuant to the Menominee Termination Act of 1954, 25 U.S.C. 891-902. It is an area in the State of Wisconsin consisting, as of June 17, 1954, of 233,902 acres of unallotted land along the upper Wolf River in northeastern Wisconsin. About 95 percent of the land is forest land which was placed under what was intended as a form of sustained yield timber management by the Act of June 12, 1890, 26 Stat. 146, and the Act of March 28, 1908, 35 Stat. 51. *Menominee Tribe of Indians v. United States,* 117 U.S. 442 at 485 (1956). The tribe held the land "as Indian lands are held" until 1961 when the defendant conveyed fee title by deed to MEI, pursuant to the Termination Act of 1954.

7. From 1854, and until the Termination Act of 1954 was implemented in 1961 by deed to MEI, the defendant held fee title to the Menominee Reservation in trust for the benefit of the tribe, and managed the affairs and properties of the Menominees. Until that deed of conveyance, defendant had the fiduciary duty of a trustee in regard to the plaintiffs, and accordingly was under obligation to act in such a manner as to safeguard the interests and property of the tribe from the standpoint of the best interests of the tribe.

8. The deed by which the United States in 1961 conveyed its legal title in the Menominee Reservation to MEI, attached covenants or restrictions on the transfer of land. These covenants or restrictions required sustained yield management of the forest in perpetuity, and prohibited alienation or encumbrance of the lands for a period of 30 years from April 26, 1961.

Introductory Facts

9. Prior to April 29, 1961, the effective date of termination of federal supervision over the Menominee tribe and over its members and its properties, the Menominees had a tribal organization recognized by the Secretary of the Interior as having authority to represent the tribe. After termination, there existed a Wisconsin corporation, named Menominee Indian Tribe of Wisconsin, Inc., over which the Secretary exercised no jurisdiction. As of 1954 the tribe had 3,270 enrolled members. On April 28, 1961, its members consisted of the enrolled members or their descendants. This court in *Menominee Tribe v. United States,* 179 Ct. Cl. 496 (1967), *aff'd* 391 U.S. 404 (1968), rejected the contention that the Termination Act of June 17, 1954, 68 Stat. 250, abolished the tribe or its membership.

10. The history of the tribe and its lands was authoritatively described by this court in the above-cited case at 179 Ct. Cl. 501-02, as follows:

> The Menominee Indians have lived as a tribe since time immemorial in Wisconsin. They have made

various treaties with the United States through the years, most of which have nothing to do with this present lawsuit. However, by way of background, we will point out that by the Treaty of St. Louis, 7 Stat. 153 (1817), they acknowledged themselves to be under the protection of the United States. The treaties of Prairie des Chiens, 7 Stat. 272 (1825), and Butte des Morts, 7 Stat. 303 (1827), settled certain boundary questions, while by the Treaty of Washington, 7 Stat. 342 (1831), and 7 Stat. 405 (1832), they ceded 3 million acres to our Government. They ceded about 4,184,000 acres to the United States by the Treaty of Cedar Point, 7 Stat. 506 (1836), and in 1848, ceded the balance of their land of approximately 4 million acres by the Treaty of the Lake Pow-aw-hay-kon-nay, 9 Stat. 952, in exchange for about 600,000 acres west of the Mississippi River.

As part of this last treaty and exchange, it was agreed that they could inspect the land west of the Mississippi before moving on it. They did so and reported dissatisfaction with it and refused to move to it. The Government then ceded them 276,480 acres of different land on the Wolf River in Wisconsin which was acceptable to them and to which they moved in 1852.

In order to legalize this exchange of land, the Treaty of 1848 was amended by the Treaty of Wolf River, 10 Stat. 1064, 1065 (1854), by which the Menominees ceded back to the Government the lands west of the Mississippi which they had refused to accept and in return the Government gave to them the reservation on Wolf River "for a home, to be held as Indian lands are held, ***."

Except for two small tracts ceded by the Menominees in 1856, for use by the New York Indians, 11 Stat. 679, the Wolf River Reservation of about

230,000 acres has remained intact as the Menominee Reservation to the present time. It was occupied and governed by them according to the customs, laws, rules and regulations of the tribe without any outside interference by the state or anyone else during the 100 years from 1854 to 1954.

11. The plaintiffs have introduced into evidence a great deal of documentary material supporting their basic contention that the defendant acted unfairly, prematurely and with insufficient study and preparation in terminating federal supervision over the Menominee Tribe.

(a) The principal witness for plaintiff on this issue was Dr. Verne F. Ray, a highly qualified anthropologist and ethnohistorian, with extensive experience in the field of American Indians. Dr. Ray has published numerous books and articles in this field, and has made studies in depth of a number of specific tribes in addition to the Menominees, including the Coleville Tribe, the Yakima, the Chinook, the Klamath, the Apache Group in New Mexico and Texas, and others. He has been a professor in the Department of Anthropology at both the University of Washington where he held a deanship in the graduate school, and at Yale University, where he also served as Research Director, Human Relations Area Files, Inc., and organization of 16 American universities conducting social science research. He has been visiting professor at several other universities. Dr. Ray is presently a consulting anthropologist. The record supports the conclusion that Dr. Ray is extremely well qualified as an anthropologist and expert in the field of the American Indians, and specifically of the Menominee Tribe. He had studied the Menominees since 1930, and intensively for 3 years prior to trial of this case. In addition to his direct testimony, Dr. Ray also prepared a report which elaborates upon his findings and conclusions. The conclusions

reached by Dr. Ray were based upon both extensive documentary evidence and information secured from discussions with a number of Menominee Indians corroborating the documentation. The purpose of Dr. Ray's study was to investigage the relationship between the United States and the tribe, and the background and factors involved in the termination policy followed by the United States during the period in question. In short, Dr. Ray was interested in the termination of the Menominee Tribe, specifically in regard to what actions were taken by the United States to effect termination; what attitude and understanding the tribe itself had with respect to termination; and the consequences of termination. The study and report covered the years 1940-1970, and was 3 years in the making.

(b) Plaintiff's other expert witness on this issue was Dr. Nancy O. Lurie. She is a highly qualified anthropologist, with an extensive background in American Indians, having received her doctorate in 1952. At the time she testified, Dr. Lurie was a full professor in the Department of Anthropology at the University of Wisconsin-Milwaukee, and had served as department chairman in 1967. She has also served as an assistant professor of anthropology at the University of Michigan, and has lectured at the University of Colorado and at the Rackham School of Graduate Studies at the University of Michigan. During the period 1965-66, she was a Fulbright-Hay lecturer of anthropology at the University of Aarhus in Denmark. She is an active member of many professional societies. As an anthropologist and citizen of Wisconsin, she had for many years been interested in the Menominees, and in the issue of termination. She has done research and given testimony with respect to a number of American Indian tribes, and has spent a great deal of time among the Menominees. Dr. Lurie was not employed by the Menominees, but offered to testify on her own initiative, having concluded

that as a scientist she should contribute any information that could be helpful on the issues in the case. Although Dr. Lurie submitted no report in addition to her oral testimony, as had Dr. Ray, she did submit copies of her research printed in scientific journals and bearing upon the problems of Menominee termination. She had read Dr. Ray's report, and agreed with its facts and conclusions.

12. The Government offered no expert testimony or evidence in rebuttal, relying instead on documentary evidence relating to the legislative history of the Termination Act. Defendant questions the relevancy of the plaintiff's expert testimony and evidence on the termination, and relies simply on the argument that the United States has plenary power over Indian affairs.

History of Termination

13. The Menominee Termination Act had its beginning in an investigation conducted by the Senate Committee on Civil Service in 1947, initiated for another purpose, namely, reduction of the number of employees required by the Bureau of Indian Affairs.

14. William Zimmerman, Acting Commissioner of Indian Affairs, in response to a request from that committee for suggestions on how the personnel and expenses of the Indian Office could be reduced, presented as a solution a program for reducing its duties by the gradual withdrawal of federal control and supervision over Indian affairs. Mr. Zimmerman prepared a list of Indian groups, divided into three parts. "The first list includes these [Indian groups] which in my judgment could be denied Federal Services immediately or in the future whichever the Congress should decide." The second group included groups who should be able to function with a small

degree or no federal supervision in 10 years, and the third group would require a longer period than 10 years. The 10-year period was an arbitrary figure.

15. In making up these groups, Zimmerman took the following four factors into account: (1) degree of acculturation (including such factors as admixture of white blood, percentage of illiteracy, business ability, acceptance of white institutions, and acceptance of the Indians by whites in the community); (2) economic conditioning; (3) willingness to dispense with federal aid; and (4) willingness and ability of the state in which the tribe is located to assume responsibilities. Mr. Zimmerman proposed the early release of 10 tribes. The Menominee were included. This appraisal by the Bureau of Indian Affairs was made without any prior study or investigation. It was the opinion of the aforementioned experts, Drs. Ray and Lurie, that the Menominee did not meet any of the criteria for termination established by Mr. Zimmerman.

16. Later in 1947, Senator Butler of Nebraska introduced termination legislation, which failed of passage. On August 1, 1953, Congress by resolution (H.R.Con. Res. 108, 67 Stat. 3132) declared "termination" to be Government policy "at the earliest possible time." The Menominee Tribe was listed among the Indians covered by the resolution. It was declared to be the sense of Congress that all offices of the Bureau of Indian Affairs, the primary purpose of which was to serve any Indians freed from federal supervision, should be abolished. The Secretary of Interior was admonished to report not later than January 1, 1954, "his recommendations for such legislation as, in his judgment, may be necessary to accomplish the purposes of this resolution."

17. On July 13, 1951, the Menominee Tribe settled a 15-year litigaton against the United States. The claim settled covered a variety of matters, including the ownership of certain swamp lands within the Menominee Reservation, which also were claimed by the State of Wisconsin; the Government's mismanagement of tribal funds; the mismanagement of the tribal forest, and the mismanagement of the tribal mills enterprise. The judgment awarded to the tribe was $8,500,000 (*see* 49 Stat. 1085 §1; *Menominee Tribe v. United States,* 119 Ct. Cl. 832 (1951)).

18. Congress appropriated the money to effect the settlement on November 1, 1951, and the funds were placed in the U.S. Treasury, to the credit of the tribe. However, the jurisdictional act under which the claims were heard by this court (Section 7 of the Act of September 3, 1935, 49 Stat. 1085) prohibited a per capita distribution of any portion of the award. Individual members of the Menominee Tribe needed and wanted a per capita distribution of part of the award and the tribe sought Congressional approval for a partial distribution.

19. On February 9, 1953, then Congressman Melvin Laird of Wisconsin, introduced H.R. 2828 permitting distribution of $1,500 to each member of the Menominee Tribe. It was passed by the House.

20. On July 15, 1953, a Senate committee amended the Laird bill by striking its provisions and changing its purpose from permission for a per capita distribution, to providing "for orderly termination of federal supervision over the property and members of the Menominee Indian Tribe of Wisconsin." The $1,500 per capita distribution was retained only incidentally as Section 6 of the Senate termination bill.

21. The Menominee Tribe was aware of the possibility that a policy of termination might be adopted as a condition to its members obtaining the desired per capita distribution. Acting Commissioner of Indian Affairs, Erwin J. Utz as early as October 1951 told a meeting of the Advisory Council of the tribe that pressure was being applied in Congress to eliminate the Indian Bureau, and that it was generally believed that this would eventually happen. He advised the tribe to take cognizance of this trend in its planning. Council members stated they were aware of the Congressional trend but believed that the Menominees were not ready to take over their own affairs, stressing their need for additional time.

22. Senator Watkins of Utah had sponsored and managed the above-described Senate amendment which passed the Senate July 24, 1953. Thereafter in conference it was the Senate version which was substantially adopted.

23. The House conferees were of the opinion that the Senate version accomplished the purposes of House Concurrent Resolution 108, as outlined in finding 16 *supra*. After extensive conferences and hearings, the Menominee Termination Act (P.L. 399, 83rd Cong.) became law on June 17, 1954.

24. Pursuant to Section 3 of the Act, the Secretary of the Interior approved and published the final membership roll of the tribe in the *Federal Register*. It consisted of 3,270 names.

25. Pursuant to the Act, final termination of federal supervision was accomplished by Proclamation of the Secretary of the Interior on April 29, 1961 (26 Fed. Reg. 3726).

Principal Provisions of the Termination Act, As Amended

26. The Menominee Termination Act contained the following key provisions:

(a) The rolls of the tribe were closed as of June 17, 1954. Thereafter the rights or beneficial interests of enrolled persons were to constitute personal property. (Section 3).

(b) The Secretary of the Interior was directed to make a $1.500 per capita distribution to each enrolled member. (Section 5).

(c) The tribe was authorized to retain at its own expense, under contracts approved by the Secretary, the services of management specialists to assist in studies, recommendations and reports as necessary to carry out the terms of the Act, said action to be completed by December 31, 1957. (Section 6).

(d) The tribe was required to prepare a plan or plans for future control of tribal property and service functions on the reservation. Federal assistance was offered if requested. (Section 7).

(e) Unless an earlier date was agreed upon by the Secretary and the tribe, the responsibility of the United States on the reservation was to terminate December 31, 1958.

(f) On that date, the Secretary was to transfer to the tribe all property theretofore held in trust for the tribe. (Section 8).

(g) The initial distribution of assets under the Act would be exempt from federal and state income taxes. (Section 9).

(h) With transfer of property to the tribe, all federal services to the tribe and its members as In-

dians would cease, and all federal laws which affect Indians as Indians, would cease to be applicable to the Menominees who would thereafter be subject to state laws. (Section 10).

(i) The interests of minors and legal incompetents were to be protected by the Secretary by such means as he deemed adequate. (Section 11).

(j) The Secretary was authorized to promulgate such rules and regulations as necessary to perpetuate the purposes of the Act.

27. The Menominee Termination Act was amended on four occasions during subsequent sessions of Congress:

(a) The Act of July 14, 1956, 70 Stat. 544, authorized reimbursement to the tribe for funds expended in the retention of services of qualified management specialists, tax consultants, etc., or "for any other expenditure of tribal funds approved by the Secretary for the purpose of carrying out the purposes of this Act."

(b) The Act of July 14, 1956, 70 Stat. 549 also made these changes in the basic Act:

(1) It required that the final plan to be formulated by the tribe must be submitted to the Secretary by December 31, 1957 and,

(2) That the tribe's plan must contain provision for protection of the forest on a sustained yield basis, and assure protection of the water, soil and wildlife. The Act stated in this regard:

> The sustained yield management requirement contained in this Act *** shall not be construed by any court to impose a financial liability on the United States.

The intent of the quoted sentence is an issue in this case.

(c) The Act of July 2, 1958, 72 Stat. 290, postponed the date for submission of the tribal plan from December 31, 1957 to February 1, 1959, and postponed the final termination date from December 31, 1958 to December 31, 1960. It appropriated an amount to reimburse the tribe in part for its prior expenditures of tribal funds to carry out the purposes of the Act, plus one-half of such expenditures incurred thereafter, or $275,000, whichever was the lesser amount. This amendment also provided that if the tribe failed to submit an approvable plan for termination by February 1, 1959, the Secretary of the Interior would cause such a plan to be prepared. If the Secretary could not get tribal agreement to his plan within 6 months, he was authorized to transfer tribal property to a trustee of his choice for "management or disposition" for the benefit of the tribe.

(d) The Act of September 8, 1960, 74 Stat. 867, extended the termination date to April 30, 1961, but provided that the Secretary must transfer tribal property to a trustee of his choice on March 1, 1961, if a tribal corporation was not functioning by that date.

Menominee County and Menominee Enterprises, Inc.

28. On January 26, 1959, pursuant to Section 7 of the Termination Act, as amended, the Menominee Tribe submitted its plan to the Secretary of the Interior contingent upon (among other things) necessary action by the legislature of the State of Wisconsin. The basic plan, revised after negotiations with federal and state officials and the passage of the necessary state legislation, was approved by the Secretary, in principle, on October 30, 1959. After certain editing, it was finally approved January 6, 1961, and published in the *Federal Register* on April 29, 1961. Under the plan as implemented by

state statutes, the Menominee Reservation became both Menominee County and the Town of Menominee within the State of Wisconsin, with some town and county officials serving in the same capacity for both governmental entities. Menominee County was attached to adjacent Shawano County for judicial functions, and for the purpose of office and functions of the county Superintendent of Schools.

29. A Wisconsin corporation, Menominee Enterprises, Inc. (MEI) was incorporated under state laws to accept title to and manage all property and assets of the Menominee Tribe, the stock to be held and managed by a voting trust for the benefit of all stockholders issued voting trust certificates. The corporation had an authorized capital stock of 330,000 shares, par value $1.00 per share. Trust certificates representing 100 shares of stock were issued to each of the 3,270 enrolled Menominees, except that the certificates of minors or incompetents were issued to the First Wisconsin Trust Company to be held for their benefit. Transferability of the trust certificates was restricted. An income bond at a par value of $3,000 was to be issued to each of the 3,270 enrolled members (or for their benefit to the First Wisconsin Trust Company).

30. The income bonds issued by MEI to its shareholders bearing 4 percent interst if earned, could be used at par value by the members of the Menominee Tribe for purchase of homestead or farm property from the corporation. They could not be sold for a period of 3 years, but in the meantime could be pledged for loans. After the 3-year period, the corporation had the option to meet bona fide offers for the bonds.

31. By its Articles of Incorporation and By-laws, MEI was vested with authority to "manage and operate all of

the business and property, real and personal, transferred to the corporation by the United States of America," pursuant to the Termination Act; to issue 330,000 shares of $1.00 par value common stock, with the right to restrict sale of stock.

32. The Articles of Incorporation of MEI as established in 1961 provide that the corporation is authorized to purchase shares of its own stock or voting trust certificates without vote of shareholders and without regard to the availability of unreserved and unrestricted earned surplus equal to the cost of such shares; that the corporation is bound to operate the Menominee Forest on a sustained yield basis, but is authorized to determine what small area of land should be designated forest lands, or removed from such designation, to eliminate from the forest restrictions small tracts found more useful for recreational or residential rather than forest purposes; that the requirement that forest lands shall be operated on a sustained yield basis is not subject to deletion by amendment unless expressly permitted by the Congress of the United States; that the corporation has no authority to sell, exchange, assign, convey or otherwise transfer all or any portion of the real property owned by the corporation unless so authorized by an affirmative vote of the holders of not less than two-thirds of the outstanding shares of stock entitled to vote thereon; that it is authorized however to mortgage or pledge corporate assets for the purpose of borrowing in an amount not exceeding $250,000, to lease the lands not designated as forest lands, or to sell or convey to individuals who were enrolled tribal members or their heirs at law, individual parcels in the aggregate not to exceed 14,500 acres for homesites, agricultural use or other development lands not designated as forest lands.

33. The business and affairs of the corporation were to be managed by its Board of Directors, consisting of nine members. At the first election, three were elected for a term to expire at the first annual meeting of shareholders after their election, the second class of three for a term to expire at the second annual meeting after their election, and the third class of three for a term to expire at the third annual meeting after their election. A minimum of four directors, including at least one member of each class, were required to be members of the Menominee Indian Tribe of Wisconsin whose names appeared on the final roll, or had to be blood descendants of such members. Directors were not required to be residents of the State of Wisconsin. Provision was made to prevent directors from also serving as trustees under the voting trust, or as a member of the County Board of Menominee County or the town board. The corporate by-laws were later amended to provide for 12 directors.

34. On April 26, 1961, the Secretary of the Interior transferred to MEI, title to the real property held by it in trust for the Menominee Tribe. Pursuant to the above-described amendment accomplished by the Act of July 14, 1956, 70 Stat 549, providing that the plan must contain provisions for sustained yield management of the tribal forest, and as a result of a corresponding and specific state statute (Ch. 258, Laws of 1959) providing a new method of taxation of forest lands required by federal law to be operated on a sustained yield basis, the deed transferring the Menominee Forest lands to MEI contained the following restrictive language:

> *** THE PARTIES HERETO MUTUALLY COVENANT and agree for the benefit of the State of Wisconsin as follows:
>
> 1. That the lands conveyed hereby shall be operated on a sustained yield basis until released

> therefrom under the laws of Wisconsin or by act of Congress.
>
> 2. That for a period of 30 years commencing with the date of this deed the ownership of lands conveyed hereby shall not be transferred, nor shall such lands be encumbered without the prior consent of the State Conservation Commission of Wisconsin and approval of the Governor of Wisconsin unless released from sustained-yield basis under the laws of Wisconsin.

35. An appraisal of the tangible property by tax appraisers of the State of Wisconsin valued the Menominee Forest at about $30 million based on stumpage prices, and it valued other Menominee property at about $4 million. For tax purposes, the Wisconsin legislature valued the forest at 40 percent of its full value, *i.e.*, approximately $12 million.

Opposition of the Menominees to Termination

36. Earlier findings have dealt with the conversion of Congressman Laird's simple proposal for a $1,500 per capita payment to each member of the Menominee Tribe, into the Menominee Termination Act. When the Laird bill (H.R. 2828, February 9, 1953) reached the Senate Subcommittee on Indian Affairs, it was initially held up by the Chairman, Arthur V. Watkins of Utah. As early as 1947, Senator Watkins had held subcommittee hearings on the withdrawal of federal services and protection from Indian tribes, although no legislation resulted at that time. Senator Watkins had developed a strong and continuing position in favor of termination and his views were forcefully expressed at the subcommittee hearings which he chaired. Senator Watkins equated "termination" with "freeing the Indians," and referred to the termination program as a "freedom program." The Senator also characterized termination

of federal supervision as "Removal of Restrictions Over Indian Property and Person." As later found, the claims herein are concerned in part with the imposition of restrictions on plaintiffs' property, restrictions thereafter imposed under state rather than federal administration. The Commissioner of Indian Affairs similarly referred to the termination program as a "readjustment program," avoiding the use of the word "termination."

37. Thereafter, the Laird bill which had dealt solely with a per capita distribution to the Menominees, was rewritten primarily as a termination bill, the proposed revisions being worked out with the Bureau of Indian Affairs.

38. On June 20, 1953, Senator Watkins visited the Menominee Reservation where he spoke at a meeting of the Menominee General Council. He made it clear on that occasion that the tribal members would be denied the $1,500 per capita distribution they sought from their own tribal funds unless they agreed to full and unqualified elimination of federal protection, services, and privileges, and took their place in the Wisconsin state governmental system on a full and equal basis with non-Indians. He stated that it was his objective to get the Government out of the Indian business; that this was for the benefit of the United States in its relationship to the Menominees, a tribe which he pointed out had just won a large judgment against the Government. He told the tribal members attending the meeting that governmental handling of tribal assets was apparently a failure, and that therefore the Government must insist on release of responsibility before becoming liable for further losses.

39. The foregoing was confirmed by Congressman Henry S. Reuss during later subcommittee hearings at which he stated:

> *** On several occasions the Tribe was told by representatives of the Federal Government that unless they agreed to termination on the Federal Government's terms, they could not have the $1,500 made available to them and to their credit in the U.S. Treasury. That proposition was put to the Tribe at the Department of the Interior in the office of then Assistant Secretary of the Interior Orme Lewis at a meeting on June 5, 1953. It was also repeatedly put to the Tribe at a meeting on the Reservation in Wisconsin on June 20, 1953 by the Honorable Arthur Watkins, the Senator from Utah, who was then Chairman of the Senate Subcommittee on Indian Affairs.

Wisconsin State Senator William F. Trinke expressed a similar opinion "*** that termination was procured by coercion."

40. Following Senator Watkins' speech the Menominee men and women present at the General Council meeting voted 169 to 5 (in a standing vote) to accept the principle of termination. No plan of any kind nor any specifications for termination had been presented to them, nor had they been advised of the many personal, economic and political consequences which would flow from termination. It had been made clear that the per capita distribution which they wanted was inextricably linked to termination, and that a vote against termination was a vote against a per capita distribution.

41. Within a month after Senator Watkins appeared before the General Council meeting following which the above tribal vote was taken, the acting chairman of the Advisory Council called another meeting and urged all tribal members to attend. The chairman had become alarmed upon learning all of the implications of the Watkins bill, and had conveyed his concern to the rest of

the membership. Because of the requirement for a 10-day notice, the meeting could not be characterized as a regular General Council meeting, but the attendance was one of the largest ever experienced on the reservation, over 200. Due to the nature of the meeting only the Advisory Council members could register an official vote. However, in accordance with frequent practice, the Advisory Council called on all the assembled tribal members for a vote, thus achieving the equivalent of a General Council meeting except for the manner in which the vote was recorded in the minutes. The question presented was: If you favor rejection of termination now even though it means that you will *not* receive a per capita payment from the tribal funds, please stand. One hundred ninety-seven stood, and none opposed rejection of termination. This vote was brought to the attention of Congress in the course of the joint hearings on termination. However, it had no influence on the course of the termination legislation.

42. On March 10, 1954, the Joint Committee on Indian Affairs met on the question of Menominee termination and conducted 3 days of hearings. On the third day Senator Watkins was the only one present on behalf of the joint subcommittee. In a conference following the hearings it was the Watkins bill which was essentially adopted. The House rejected the conference report and further conferences were required but the bill that reached the Congress was the Watkins bill with a modification of the time schedule to provide that the final withdrawal of federal services should occur on December 31, 1958 rather than December 31, 1956 as originally provided. As earlier described, the Congress passed this bill in early June, and it was signed by the President on June 17, 1954. Subsequent amendments postponed the termination date to April 30, 1961.

43. A considerable amount of opposition to termination was expressed by prominent Government officials and social scientists who had observed the reaction of the Menominees. Congressman Reuss of Wisconsin testified before the Indian Subcommittee of the House:

> The Termination Bill is defective, in my opinion * * * it was not consented to by the Tribe, and it does not provide for the Tribe's consent for its future governance from now to eternity. * * *

The Superintendent of the Menominee Reservation for the Indian Bureau wrote the Commissioner of Indian Affiars on December 10, 1954 that:

> * * * [T]he Menominees, or at least their leaders, are violently opposed to withdrawal and have repeatedly stated in meetings "The Government and Congress want withdrawal, now let them do it as we don't want any part of it." The record here is clear as to what we [the Bureau of Indian Affairs] had done and attempted to do in carrying out the policy of the Bureau in regards to withdrawal. [And on Feb. 1, 1955] I question very much whether we are going to be able to "Sell" the Menominees on the Withdrawal Program.

Bureau Program and Administrative Officer R. W. Quinn reported that:

> * * * [W]e are experiencing non-acceptance, resistance and a considerable bewilderment, irritation and conflict among the Menominee people. The mental state of the people is contrastingly different than you would expect from a group with their reputation * * * they have never had to carry the day to day management work load. Government employees carried this load.

* * * * *

Almost no one wants withdrawal and most are seriously confused.

* * * * *

On major issues negative to withdrawal it is safe to say that the Advisory Council would have little trouble rallying all groups.

* * * * *

The demand for per capita payments and independence from the Advisory Council and from the Agency does not indicate an actual desire or conviction of their readiness for withdrawal, it's a demand for their "fair share" which they don't think they'll get otherwise.

The chairman of the Menominee Advisory Council wrote that "[w]e all know that there will be a movement * * * to ask the new Federal administration and the Congress to reconsider the advisability of termination."

44. A political scientist, Dr. Gary Orfield, wrote that:

In 1953, Watkins secured Senate passage of a harsh termination bill. Many Menominees saw the issue as either accepting the Watkins bill in the next session or submitting a substitute measure more favorable to the tribe. At this time, no one in the tribe had the faintest idea of the implications of termination.

Dr. Orfield also pointed out that in its description of the action by the tribe during subsequent Congressional hearings:

The BIA made no explanation of the context within which the tribe had voted. The decision of 200 people [actually, only 174] who needed money, who were told that termination was coming anyway, and who hadn't the least understanding of the implications of termination, was taken as the considered judgment of the entire tribe.

* * * * *

He concluded that:

There is no evidence that the majority of the Menominee people favored termination at any time.

* * * * *

The termination act was based on a series of false assumptions. * * *

45. Dr. David W. Ames, an anthropologist sent to the reservation by the State of Wisconsin, later wrote that Senator Watkins—

* * * Made it clear that there would be no per capita payment unless the tribe accepted federal withdrawal. One hundred and sixty-nine tribal members voted in favor of the principle of termination; 5 voted against it. This group could hardly be representative of the much larger total enrolled adult membership of the tribe; one wonders why there was no call for tribal referendum on a decision of such importance.

Though the tribe "officially" voted for the principle of termination, the Menominees made it clear early in the negotiations that they disapproved of the way it was to be carried out, especially in regard to timing. They voted against the Watkins bill in two subsequent General Councils and established a planning commission to devise their own termination legislation and plans.

* * * * *

Some Menominee later explained that they voted for termination because they were "tempted" by the large sum of money involved in the per capita payment. * * * Most Menominees I have spoken with say * * * that the per capita payment was an "outright bribe" or "stick" by which they were "forced" to accept termination. When it is argued that the tribe had responsibility in that its members

permitted themselves to be "bribed", the reply is that it was difficult to behave otherwise in the economic and social circumstances of the average reservation adult. * * *

46. Dr. Robert B. Edgerton, who spent the summer of 1959 on the Menominee Reservation, noted that:

> * * * [N]o tribal referendum was called [on the question of termination]. [And out of a Menominee population of about 3,100 enrolled members,] [o]ne of the most important issues ever to be considered by the tribe was settled by 174 people. * * *
>
> * * * [T]he Menominees were faced with the necessity of submitting a termination plan acceptable to the Secretary of the Interior * * * or having the Secretary draw his own plan and turn over tribal lands and funds to a trustee of his own selection. Very few Menominees understood these alternatives; most knew only that termination was coming unless they did something to stop it and they felt powerless to find that something. The reservation was in turmoil, and * * * there was an almost universal concern with the approaching reality of termination.
>
> * * * * *
>
> Many Menominees are completely ignorant of the meaning of termination. * * *
>
> There is no doubt that the great majority of Menominees was opposed to termination in the summer of 1959. * * *

Similarly, the Secretary of the Interior in 1958 declared that no tribe would be terminated unless a clear majority of its members agreed. He noted that a clear majority of the Menominee Indians neither accepts nor understands termination, and queried how it was possible for termination to come to an Indian people without a tribal referendum.

47. The earlier mentioned Dr. Ray, plaintiffs' expert witness at trial, stated in his report:

> [The acceptance of the Watkins bill was in part a reflection of a conviction that termination was inevitable, but there was also the feeling that rejection of the bill currently offered would result in a much less acceptable or favorable bill being presented in a near future session of the Congress with passage of such a bill further detrimental to the Menominee tribe.]

48. Although the opposition of the Menominee Tribe to the concept of termination appeared, at times, to be directed more toward the short time frame in which it was to be accomplished, rather than toward the concept itself, it is clear that the opposition of the tribal members was fundamental. That opposition was effectively neutralized prior to passage of termination legislation by the statements and actions of Senator Watkins; by the need of the tribal members for the per capita distribution; by misunderstandings as to the full implications of termination; and by the innocent conviction that if termination when tried proved undesirable, it would be repealed. With respect to the last factor, Program Officer Quinn noted that:

> The general feeling is that * * * [State and University] studies will uncover facts which will only prove that the entire withdrawal proposition is unrealistic in terms of the immediate future.

49. Later, when the character and practical implications of termination came to be better understood, tribal opposition intensified. The feeling against termination was so strong in 1960 that the Menominee Tribe repudiated its leaders and charged them with failure to stop termination and return the Menominee to federal supervision. Shortly thereafter, a petition was circulated

and signed by 600 tribal members asking for outright repeal of the Termination Act. The reaction of many members was to boycott tribal meetings. They believed that their non-attendance would prevent termination from actually occurring, since non-attendance was "a traditional expression of negative opinion even to meeting for discussion on a matter."

50. The State of Wisconsin, which was also strongly opposed to termination, encouraged the Menominee Tribe in its continuing opposition and took legislative action to stop termination. Within days of the final termination deadline the legislature unanimously approved a resolution requesting repeal. Contending that tribal assent had been "obtained by duress" the resolution provided:

> Resolved by the senate [the assembly concurring], That the legislature of the State of Wisconsin requests the Congress of the United States to repeal or amend Public Law 399 * * * so as to retain and continue indefinitely federal supervision * * * until such time as the Menominee Indian Tribe has achieved a status comparable and equal to the average citizen of the environs * * * and until the tribe has initiated a request for termination of tribal status and such request has been approved by an official vote of the enrolled members of the tribe. * * *

51. In response to a question as to why the Menominee Tribe was selected for termination the above mentioned Dr. Ray responded:

> Well, the Menominee Tribe was selected for Termination, I think, for some reasons that I have already mentioned, the fact that they were listed by the Bureau of Indian Affairs in 1947 and 1953 as being a tribe that might immediately be terminated

> because the Menominee Tribe had just recently won an $8 1/2 million judgment from the United States for mismanagement, because this recovery added to what they had in their treasury brought the total up to over $10 million, because superficially it might appear—because superficially it appeared that the Menominee Tribe were in a more acculturated condition than in fact they were, because of the actions of Senator Watkins, both in terms of his deeply felt conviction that all American Tribes should be terminated as soon as possible, and that the Menominees should be one of the first, together with his actual handling of the matters concerning Termination in the Subcommittee on Indian Affairs, of which he was the Chairman, and his very forceful presentation to his colleagues of his views on Termination.

Because of these several factors, I think the Menominee Tribe was selected.

In his statement to the Menominees Senator Watkins had said:

> You had a just complaint and you brought suit against the United States, and one of the complaints was that the United States mismanaged your lands and property to the extent that you suffered damages in the amount of $8,500,000; * * *
>
> [I]t would be good to get rid of Uncle Sam because he cannot possibly do the job.

Inadequacy of Measures Taken to Prepare the Menominees for Termination, and Management of Their Own Affairs

52. Termination was proposed and enacted without prior consideration and study of how it was to be implemented.

After the passage of the Act, it became obvious that comprehensive studies would have to be conducted to

determine whether or not the Menominees were prepared to carry out the responsibilities to be assumed by them and how they were to be prepared to assume those responsibilities. However, these studies were not initiated until over a year following passage of the Act. By 1956, Congressman Reuss was citing the danger to the Menominee Forest which termination had brought about. He also referred to the tax problem confronting the Menominees. He had the impression, for example, that the annual net income of the Menominee Tribe would be $400,000, and its annual tax bill $800,000. He was also alarmed by the provision in the termination legislation that the Menominee Tribe would be as he put it "shoved out on an out-you-go-ready-or-not basis" whether or not an acceptable plan could be devised during the 4 years allotted for after-the-fact study.

53. In June 1955, William Zimmerman, Jr., who had been Acting Commissioner of Indian Affairs in 1947 when the termination policy was initiated, declared that: "Bureau officials, including the Superintendent, frequently failed to inform tribal officials when plans were being considered and adopted by the Bureau." He also pointed out that problems arising after passage of the Act, such as hunting and fishing rights and the status of the tribal court, had not been explored. Other problem areas resulting from lack of prior study, were stumpage payments, and the fate of tribal enterprises such as the hospital, welfare payments, and conduct of the schools.

54. In September 1955, Glenn L. Emmons, the Commissioner of Indian Affairs, writing to the Attorney General of Wisconsin, agreed that:

> [D]ifficult and complex problems confront the Menominee Tribe * * *, that solutions to these problems cannot be developed without extensive research, and that very considerable effort must be extended jointly by the tribe, the Department of

> of Interior, and the State of Wisconsin and its local governments in achieving those solutions.

Commissioner Emmons then alluded to the contract with the Wisconsin State Department of Public Instruction which provided for an adult educational program:

> [T]o help the members of the tribe to earn a livelihood to conduct their own affairs, and to assume their responsibilities as citizens without special services because of their status as Indians.

In this letter Commissioner Emmons continued:

> Over the years the Indian Bureau staff has assembled substantial data and familiarity pertaining to Menominee resources and society * * *. These efforts will be continued and we expect them to intensity [sic] * * * [W]e will provide every reasonable assistance within the limits of facilities and funds available to us.

In the years that followed, these data and this assistance were not forthcoming.

55. Necessary studies were left to the Menominees or to the State of Wisconsin. In this respect James G. Frechette, Chairman of the Menominee Indian Advisory Council, stated:

> * * * [T]he Indian office in its administration of the Menominee withdrawal legislation has definitely defined a policy which throws the entire responsibility for any affirmative action or planning directly in the laps of some thousand-odd adult Menominee Indians who, over the past century, have been closely supervised, directed, and controlled by the Bureau of Indian Affairs; whose thoughts, desires, and recommendations to the Bureau of Indian Affairs; whose thoughts, desires, and recommendations to the Bureau of Indian Affairs in the past, with respect to their own economy, were by and large ignored; and on the other hand, all directions came affirmatively from the Bureau. Under a cen-

tury of such wardship and control, it was only a natural end-result to look to, and lean upon, the federal government. This immediate breaking-off from such control and jurisdiction is, therefore, breath-taking and terrifically demoralizing.

* * * * *

The Bureau places upon our shoulders the affirmative responsibility to take care of matters locally and then, in the next breath, tells us we have no authority to do what needs to be done.

* * * * *

It must be remembered that the leaders of our tribe who grasp these problems and understand them are family men with family responsibilities and private employment responsibilities, and all of these things must be done on their own time when they are not working for a livelihood.

56. Others also commented on this policy of the Bureau of Indian Affairs. Dr. Gary Orfield concluded:

From the outset, the Bureau of Indian Affairs made clear its intention to hold the tribe responsible both for the necessary research and for the decisions determining the form of organization to be created after termination. Six months after the bill was passed, the Bureau cut its local staff by over 50 percent and began to transfer functions to the Advisory Council. * * *

With the added workload, the remaining local agency employees of the Bureau were unable to give attention to Menominee needs for studies and planning, even apart from the effect of the locally enunciated policy to provide reasonable assistance if requested. The result was that the tribe received very little meaningful assistance from the Bureau.

57. During 1955, the earlier-mentioned local agency employee, Program Officer R. W. Quinn, recognized the problems flowing from termination, but he was without authority, staff, or funds to meet those problems. He observed in a memorandum of January 31, 1955, that the Menominee situation was confusing and he characterized their reaction as one exhibiting a "high degree of anxiety," together with "bewilderment, irritation and conflict." An attitude of non-acceptance and resistance, not characteristic of the tribe, had developed. The problems growing out of termination, as they developed, were beyond comprehension of the tribe. Mr. Quinn prepared an analysis in which he expressed the need for diagnosis by "people expertly trained in the field of social science. So far I have not been able to find much evidence of those kind of studies made on the Menominee Reservation." In his opinion, more than "administrative skill" was required, namely, "sound social studies." He concluded that the Termination Act placed the burden of responsibility of preparing themselves for termination on the Menominees and that "if the cost of these studies are to be paid for from tribal funds that very likely they will not be made."

58. Dr. Ray, plaintiffs' expert witness, notes that the foregoing obviously constituted knowledge and notice within the Government that in-depth studies were needed. The Commissioner of Indian Affairs, however, dismissed this advice from the local program officer with the statement that funds available for that type of research had already been obligated for fiscal year 1956, and with the opinion that necessary training of the Menominees in their responsibilities of citizenship and for the transition that they must make could be accomplished by an "adult education program." Similarly, Dr. Lurie testified that the Government was aware of the science of applied an-

thropology in aiding groups forced to accept cultural concepts other than their own, and had in fact established an anthropological division in the Bureau of Indian Affairs as early as 1935. The Society for Applied Anthropology had been established around 1944 based on experience gained within Government both at the Indian Bureau and elsewhere during World War II. Anthropologists had specifically testified and spoken publicly on the dangers and difficulties attendant upon a policy of termination of federal trusteeship over Indians.

59. In 1957 a Menominee Indian Study Committee created by the Wisconsin legislature expressed concern regarding the absence of data necessary for decisions on social, civil and governmental service needs of the Menominees, and in 1960 just before termination became effective, the tribe was still asking for a Congressional team to study termination problems and to "appraise the actual situation of this Tribe."

60. Necessary studies had not been made prior to the enactment of termination, and the tribe which would have been the subject of such studies, was certainly in no position to know the research techniques necessary to initiate studies directed toward themselves. The aforementioned state-sponsored Menominee Indian Study Committee (MISC) was not established until 1955 and therefore did not hold its first meeting until a year after passage of the Menominee Termination Act. Its research was therefore not directed toward whether or not termination should take place, but what to do about it, assuming termination to be an accomplished fact.

61. MISC had been created by Joint Resolution of the Wisconsin legislature as the result of a request for help directed to the State of Wisconsin and its university by the Menominee Advisory Council. The 14-member committee consisted of three members of the tribe,

representatives of each of the two counties within which the reservation was contained, six members representing the state's departments concerned with taxation, public welfare, public instruction, highways and conservation, one State Senator, two Assemblymen, and the State Attorney General. Its job was to study the transition problems and to develop specific recommendations and legislative proposals to the Joint Legislative Council, so as to permit the introduction of necessary bills during the 1957 legislative session. The studies of this state-sponsored committee were in part financed by tribal funds.

62. The state legislature eventually adopted a series of statutes, creating a Menominee County, coterminous with the Menominee Reservation, and transferring the tribe and its activities from federal to state auspices. These state laws were to be effective on the date of publication of the termination plan in the *Federal Register* (which occurred April 29, 1961), but *only* if that plan required a covenant in the deed of the forest lands to be conveyed by the United States, restricting any subsequent transfer of ownership or encumbrance of said lands for a period of 30 years thereafter (subject to certain exceptions).

63. MISC relied heavily upon the faculty of the University of Wisconsin to supply it with basic research. The university assigned David Ames, an anthropologist, to take up residence on the reservation and to undertake a thorough independent study of the social aspects involved in termination. The Wisconsin-Michigan section of the Society of American Foresters offered to assist in studies of the forest.

64. Dr. Ray observed that MISC, being a state committee, was state-oriented and that it was furthermore handicapped by the fact that its studies did not precede termination and therefore could not be directed to the

basic question of whether or not termination was advisable at all. Although well-intentioned, the committee members examined the Menominee problems –

> within the confines of their customary governmental operations in which they considered the Menominee, who constituted less than one per cent of the state's population, as not holding any special rights by virtue of treaty provisions or trust status.

Dr. Ray further reported that little was accomplished by MISC because it was constituted to ignore the human factors and social problems of termination in favor of the pragmatic consideration of legal, governmental business, forestry and agricultural problems with the interests of the state paramount. Furthermore, the anticipated help from the university faculty was handicapped by the fact that faculty members had classroom teaching and other duties to discharge. MISC did not view its mission as one of developing a termination plan for the tribe. Rather it collected data and presented that data to the tribe for whatever disposition it chose. The chairman of the University Advisory Committee stated that "[t]he job of the Menominee Indian Study Committee was to keep the heat on the Tribe to come to their own decision."

Dr. Ray concluded:

> That the professionals should have thought the Menominee capable of solving problems which they, themselves, found to be of "extraordinary complexity" was remarkably naive, and considerably reduced the value of the efforts given to Menominee studies. Only when the interests of the state were paramount did the committee make, and stand behind, firm recommendations.

As evidence of this, MISC subsequently reported that:

> Failure to evolve a satisfactory plan [for termination of the Menominee Tribe] would result in disaster as to the best interests of the State of Wisconsin.

65. On October 3, 1957, the chairman of the University Advisory Committee wrote the chairman of the Menominee Advisory Council, urging that it was the council's responsibility to carry out all studies on termination problems, and advising against the tribe's setting up its own study committee. However, the council was not equipped to carry on such studies. As a result, the tribe organized its own special study group, named the Coordinating and Negotiating Committee.

66. In February 1959, MISC turned its attention to the omnibus plan which the tribe had supplied. The chairman of MISC, Attorney General Reynolds, gave the numerous committee consultants 2 weeks to prepare and dispatch their comments. The final meeting of MISC was held on April 21-24, 1959, at which time the subcommittees, including the University Advisory Committee, submitted their reports on the omnibus plan. Spokesmen for the university and state committees explained that:

> The omnibus plan is large and complex *** the issues and problems many. *** We must frankly confess to have done little better than to have skimmed the surface on these problems.

67. The Menominees evaluated the studies of the state committees and found them to be of little help in resolving the termination problems they faced. Chairman James Frechette recorded his concern as follows:

> In evaluating the studies *** we come to the conclusion that in some fields of research the University may *** be limited either in personnel available or

research materials, that would make it necessary for us to seek this information in specialized fields.***

No specialized research facilities were, however, developed by the United States, the State of Wisconsin, or the tribe.

68. It was left to the aforementioned Coordinating and Negotiating Committee, salaried employees of the tribe, to prepare and complete the final tribal plan required by the Termination Act. Their plan was presented to and approved by the Menominee General Council on January 17, 1959. The committee's chairman was of the opinion that:

> None of these studies (by the University) had conclusions or a blueprint. Essentially they put into writing what everyone already knew. Action was left entirely to the tribe.

He further concluded that the so-called "Adult Education Program" designed to prepare the Menominees for termination, was not achieving that purpose because:

> *** [T]he large majority of the people were not able to absorb the material being brought to them, they were not able to translate it to real meaning because they had not had the base of experience or training necessary to understand the material and so had dropped out of the classes, which dwelt on the forms and responsibilities of state and county government and business organization. I found that the basis of the material being given to them was fixed in the Wisconsin law on governmental structure, and the general law on business organization. I read all the available material developed and found no exposition of the impact or full meaning of Public Law 399 in all its implications with respect thereto. The people simply did not understand. The Adult Education Program instructor has admitted to questioners that Public Law 399 is too complex for him to interpret. *** [T]he Bureau of Indian Affairs and the Department of the Interior have offered no recommendations. The Menominee Study Committee and the University staff assistants have made prodigious studies and have laid out perspectives, but have left decisions to the Tribe without recommendations.

69. Dr. Ray concluded on the basis of the foregoing that defendant, after requiring involuntary termination, thereafter abdicated its reponsibilities to prepare the Menominees for termination. The state's substituted efforts were inadequate, leaving the tribe, which had theretofore been cared for under a trust relationship, with the responsibility of preparing itself, although its members lacked the necessary training and sophistication in social, economic and governmental affairs. Rather than offering increased assistance, the Indian Bureau began to withdraw services which it had been providing prior to enactment of termination. He lauded the work accomplished by the Coordinating and Negotiating Committee finally established by the tribe, largely because of the presence on that committee of Mr. George Kenote who had left the reservation many years before to work for the Bureau of Indian Affairs, and who had 28 years of service with the Bureau. Mr. Kenote wrote most of the committee reports on which final action was based, so that the Menominees:

> [H]ad benefit of the services of only one man with the training and insight that could and should have been provided by the United States, in research teams, as a minimal contribution to the termination program, which it had demanded and achieved for its own benefit. Instead, the tribe had the services of this one man only by hiring him to leave

his specialized activities in the Bureau of Indian Affairs for a time, thus providing his talents to the Menominee people.

* * *

*** The state tried to compensate for the federal government's dereliction, but failed. The tribe succeeded in formulating a plan acceptable to the United States but it was a defective plan. Had the United States properly carried out its obligation, as initiator of the idea of termination and as trustee for the tribe, its far greater competence in research and analysis would undoubtedly have resulted in complete abandonment of the termination project.

70. The Menominees were, in effect, "in the middle" and left largely to their own devices in dealing with federal and state governments, neither of which was prepared nor disposed to treat with the problems of termination confronting the Menominees, other than from the standpoint of federal or state problems. By way of illustration, the Secretary of the Interior on July 16, 1959 when the Menominees were still under federal supervision and protection, sent the following telegram to the Menominee Advisory Council:

> Reurtel July 9 concerning state legislative proposal for thirty year restrictive covenant on sale Menominee Forest property, we think proposal unfair in discriminating against Menominee property rights in manner not applied to other Wisconsin citizens. In answer your specific query does Secretary have right to do this, we believe we can but would do so reluctantly only because you appeal that it is only way Menominees can get state legislation they want. Also it is in *** accord with desire of all parties that forest be retained in Menominee ownership with maximum benefits from sound conservation practices. We will incorporate a proper restrictive sale covenant in the deed provided Menominees give their consent, ***.

There is no evidence that defendant assisted the Menominees is resisting the state's requirements. Instead of Secretary of the Interior took the position that:

> Certainly in areas of preponderant State of Wisconsin concern, where the Tribe and the State can agree, it is very likely that we can feel that those elements of the plan are approvable. ***

71. On the other hand, as Dr. Gary Orfield concluded from a review of the minutes of the state-sponsored MISC:

> Members of the Menominee Indian Study Committee did not believe that it was their function to prepare a definite plan for the tribe, but rather to conduct research and analyze the various possible courses of action as objectively as possible. The information was to be presented to the tribe, and all decisions were to be left to the Menominees. The committee thus shared with the BIA and the Congressional subcommittees the assumption that there was a working political democracy on the reservation and that a series of basic decisions on issues of extraordinary complexity could be left to the General Council. *** Only where the direct interests of the state were involved was the committee to take a forceful position.

* * *

The study committee operated within the assumption that termination was a Federal policy and could not be changed. It conceived its function as elaborating and commenting upon the options of the tribe within the context of the legislation, while protecting the interests of the state. It was facilely assumed that the longrange [sic] interests of the state and the tribe were identical. Committee members saw the termination program as the result of an agreement between Congress and the tribe. The state committee now had to try to make the best of the arrangement for all parties.

* * *

"The job of the Menominee Indian Study Committee," says one participant, "was to keep the heat on the tribe to come to their own decisions. ***"

72. The last quoted opinion was inconsistent with MISC's independent conclusion that the Menominees "do not and cannot understand the full context, intricacies and implications of the huge and complex governmental and economic plan presented to them."

The Menominees Were in Fact Not Prepared for Termination When Enacted in 1954, Nor When Put Into Effect in 1961

73. During the period between enactment of termination and its effective date, the number of federal and Wisconsin representatives publicly expressed the opinion that the Menominees were not socially, culturally, economically and politically prepared. These included Congressmen Laird and Reuss, the latter stating during House subcommittee hearings in 1955 that:

> *** Termination of the Federal Government's umbrella, which has kept the Menominee free of state taxation for the last 100 years, and has thus enabled them to make an economic go of it, that kind of termination, unless it be soundly based on the consent of the Tribe and a provision for protection of the forest, should be postponed, as far as I am concerned, forever. ***

State Senator Trinke wrote in 1959 that the Wisconsin Congressional delegation and the tribe had done everything possible to prevent approval of the termination "amendment" to the per capita payment bill, and he concluded:

> It is my considered judgment that the [Menominee] Indians have not reached the status where they can control their property, and that the government should retain its responsibilities under the treaty for another twenty to twenty-five years. Five of us [of the Wisconsin Senate] *** have offered a resolution memorializing Congress to vitiate the agreement and continue the present status under which the Indians have been happy.

On July 27, 1959, State Senator LaFave, speaking to a meeting of the Menominee General Council, frankly told the Menominees that in his opinion the tribe was not ready for termination; that the Menominee leaders were not competent for self-administration; that the Menominee economy was not viable within the contemplated tax structure; and that the Menominee people were in no way ready for self-government and should be protected by a trustee.

74. County officials in adjoining Shawano County directed the following resolution to members of Congress concerned with termination:

> *** WHEREAS, the State of Wisconsin, Shawano and Oconto Counties were not considered by the Congress in the passage of Public Law 399 [the termination bill] and only one hundred fifty Menominee Indians from a tribe of over three thousand attended the meeting of the tribal council which considered the acceptance of the terms of Public Law 399,
>
> BE IT RESOLVED *** that [the senators and congressman addressed] *** be requested ***
>
> 1. To introduce immediate legislation to repeal Public Law 399 in its entirety.

75. The social scientists were similarly in agreement that the Menominees were not prepared for termination. They cite the inconsistencies in defendant's position that the Indians were to be given the same rights as other

American citizens, but thereafter to be very closely circumscribed in the management of their valuable forest as if they were wards. Dr. Orfield stated:

> The Department [of Interior] thus completely reversed its policy. The most fundamental assumption underlying the termination legislation was that the Menominees were as competent as any other citizens to freely manage their own property. The Department still insisted that the tribe was competent to establish and support a local government, but that the free choice regarding the disposal of tribal property was to be qualified by restrictions which would apply to no other Wisconsin corporation. The Menominees were to lose the advantages of trusteeship without gaining the privileges of ownership.

76. As earlier found, defendant had applied a number of criteria in determining whether or not a tribe was prepared for termination. With respect to the first of these, "acculturation," Dr. Ray observed that:

> [I]t is a complex process comprised of a multitude of phenomena, the most significant of which do not appear on the surface ***. It may be a little closer to actuality to say that a people is to a considerable degree acculturated in the sphere of religion—as was true of the Menominees in 1954, since almost all were nominally Catholic. But it is dangerous, and usually impossible from the facts to characterize a people as being to a specified degree acculturated in the social, or the ethical sphere; or in the field of values; or work habits; and so on.
>
> In 1954—also 1961, and today—the Menominees were far from fully acculturated in many of the spheres most critical to the successful entry on an unlimited and unrestricted basis into the world of Wisconsin whites.

Similarly Dr. Lurie testified:

> It is very easy for people to see some similarities to themselves. We have made this mistake frequently in regard to Indians, and assume that in all ways and in all respects, they are going to move in the direction of, say, the European immigrants, or any other minorities.
>
> * * *
>
> The other aspect of it was really the relative powerlessness of the Menominees by this time. Their financial situation was one in which their options had become increasingly limited. The only thing that they were all agreed on, and as far as I can tell, virtually all are still agreed on, is that they would see the solution as a reverse of Termination.

And Dr. Orfield stated, on the basis of research conducted long prior to this legislation, that:

> Neither the Congress nor the BIA concerned themselves with the problem of culture, and certainly there remained relatively little of the aboriginal culture in any visible terms. ***
>
> During a long period of dependence upon federal supervision, however, reservation life had developed a system of values and expectations of its own. Tribal members were not accustomed to making their own decisions, and they had grown to expect a wide variety of services without charge. People expected to be given jobs in spite of their poor work habits. Only a small elite shared the middle class values common to a small town. Few of the Menominees had any drive to save and invest in order to improve their economic status. Most were satisfied as long as they could support themselves. There were things more important than money.
>
> * * *

The great bulk of the Menominee people show evident effects of *** [100 years of] "reservation culture." Apathetic toward tribal government, they always expected care when they were in need. Unaccustomed to planning for the future, these people could be depended upon to vote for the policy providing an immediate personal advantage, rather than that in the long-range interest of the tribe. ***

BIA figures also showed the income of the average tribal member to be comparable with that in the surrounding counties. [B]ut *** the size of the average Menominee family was far larger, and thus the individual standard of living was substantially lower. *** the counties upon which the comparison was based were made up of cut-over timberland which could support only marginal farming operations. *** There were no local business leaders, and all important management was in the hands of outsiders. The Menominees *** were far from possessing the skills and experience necessary to successfully run the timber operation and the local government in the manner of other Wisconsin communities.

And Dr. Ames of the University of Wisconsin concluded:

> I have found no one [be he Menominee, federal official or Wisconsin citizen] who does not believe that a consistent, well thought-out program to prepare the Menominees and their neighbors for the problems of termination should have been initiated 20 years ago, if termination had to come or was desirable. Since this was not done, the Menominees, their neighbors, and Wisconsin will suffer from the lack of foresight of the federal guardian.

77. As to the Menominee's preparation for self-government, Dr. Edgerton was of the opinion that:

> *** [T]here is no semblance of an informed electorate. Many Menominees are completely ignorant of the meaning of termination and most are totally innocent of modern politics. ***

Dr. Ray's report on this point observed:

> Self-government in the contemporary American sense was even more foreign to the Menominee than parent-teacher groups or scout troops. In the reservation pattern, the tribal council made recommendations to the Bureau of Indian Affairs, the Bureau passed down edicts to the tribe, and litigation was handled in the federal courts. Nothing in this arrangement prepared the Menominee for dealing with the strange and complex features of Wisconsin county government, in which sphere the tribe was remarkably lacking in readiness for termination.

* * *

In the same context, the history of the allotment in severalty of Indian lands should be considered. In 1887, a fundamentally new Indian policy was adopted by the United States with respect to Indian lands. The Allotment Act provided that each individual or family be given its own portion of land with the notion that the Indians would thus turn to agricultural pursuits, and tribal bonds would be weakened. The Menominees rejected the Allotment Act; they were fearful of losing their lands and they were not inclined in any way to become agriculturalists. Since the tribe continued to hold all of its lands in tribal status to the very day of termination, they had gained no experience in the handling of land as a privately held possession. As a consequence, they were much less competent to be cast on their own in the matter of land holding, as demanded by the termination legislation, than were many other tribes who had held their lands privately

for many years rather than in trust status under the United States. The government never took this fact into consideration in choosing tribes for termination. Although the tribe itself had rejected, for good reasons, the allotment principle, during the ensuing years, the government judged that the Menominee were not ready for allotment. Clearly, if they were not ready for allotment they were not ready for termination.

As analyzed by Dr. Orfield:

> The Menominee people lacked the first requisite for self-government—a fundamental sense of community and a consensus on common ends. ***

He concluded that the Menominee Tribe was unprepared for any form of self-government, and was particularly unequipped for democratic government. He further concluded that:

> [T]he Menominee people were deeply divided, and those divisions created competition, criticism, suspicion, and continual struggle against those in authority.

78. The Menominees were unprepared by education to assume the responsibilities of termination. Although Menominee children attending school at the time of termination generally reached the eighth grade before discontinuing their studies, they were not the ones involved in the problems of termination. Those decisions had to be made by older tribal leaders who had not even achieved that modest level of schooling. Furthermore, the quality of the education received could not be measured by the grades through which the children had progressed. Most of the larger students worked a half day on the farm, on the woodpile, or on the school grounds, and attended school a half day. Many completed no more than the sixth grade.

As Dr. Ray stated:

> Even if the Menominee education, in the textbook sense, had been wholly equal to that of Wisconsin generally, it would still have been no valid indication that the tribe was well enough educated to be terminated. It is an egregious error to assume that going to school on the reservation prepared a Menominee for life in the competitive world of the whites. Upon leaving school, the Menominee still knew little about typical non-reservation life in Wisconsin, and had learned almost nothing about business. The only real local business was the sawmill, which was run by white employees of the Bureau of Indian Affairs—albeit they were paid by the Menominee.

On the latter point, Dr. Ames stated:

> *** [I]t is not surprising that Menominee lack certain managerial and technical skills in their mill and logging operations. For many years they were excluded from the better paying managerial, supervisory and skilled positions in their own enterprise.

79. Language also presented a problem. Some Menominees in middle age spoke only their native language and termination had to be explained to them through an interpreter.

80. Relationships between the Menominees on the reservation, and the non-Indians resident in adjacent counties had never been very good. In this connection the Governor's Commission on Human Rights reported:

> The Reservation system by its very nature has been a segregated system and has bred distrust and ignorance between the on-group and the neighboring off-groups by preventing normal lines of communication and contacts. Because of their special status and isolation, the Menominee have been deprived of

their full American heritage in terms of the "rough-and-tumble" and "give and take" of the every-day life of average citizens.

81. In terms of general welfare termination meant the loss to the Menominees of their local doctor and hospital. When termination was first proposed, the above-mentioned Commission on Human Rights reported that less than 5 percent of the tribal children had adequate diets, and the number of Menominee families and individuals receiving some public assistance was six times the state average.

82. Prior to termination the assets of the Menominee Tribe were held in common ownership. These assets included the reservation's lands of approximately 234,000 acres, the substantial forests of hardwoods and pine, the sawmill and all other tribal equipment and buildings, and the monies in the treasury. Each tribal member of the total of 3,175 in 1954, was a co-owner with a communial interest in the tribal assets. Communal ownership was an essential and traditional cultural value of the Menominees. The individual Indians had use rights recognized by the tribe and other members, but no piece of paper evidencing ownership of a particular tract of land.

As explained by a tribal officer:

> Throughout the years, the individual Menominee Indian has never owned title to the land upon which his individually owned home is situated. He has owned the home privately, but not the fee title to the land under his home. ***

After termination, each individual was required to purchase the land from Menominee Enterprises, Inc. in order to have title to it and to his home. A prominent Menominee leader wrote to a United States Senator that

"Rightly or wrongly *** the rank and file of the Menominee people see in the termination act still another design to separate them from their homelands. ***

A woman wrote to then President John F. Kennedy that:

> My heart is heavy with sorrow *** I am a Menominee Indian *** I can't and do not know how to express my true feelings about loosing (sic) our reservation.

Impact of Termination Upon the Menominee's Bank Balance, Other Assets, and Way of Life

83. When the Termination Act was passed, the tribe had a balance in the U.S. Treasury of $9,960,895. Shortly after enactment of the Act on June 17, 1954, $4,905,000 of this was distributed as a $1,500 per capita to each of the 3,270 individuals on the final roll of the tribe.

84. On February 9, 1955, in response to a request from the Commissioner of Indian Affairs for advice on whether prior per capita payments made to the Menominees had been properly and legally computed, the Solicitor for the Department of the Interior concluded that per capita payments commencing in 1941, based upon the fair market value of the timber cut from the reservation under the Act of June 16, 1934, had in the past been improperly computed. A recomputation of these per capita payments in accordance with the Solicitor's advice indicated that a disbursement in excess of $2 million would have to be made unless otherwise directed by the tribe. Although advised by Bureau officials and their own leaders that full payment would endanger the economic well-being of the tribe, it voted by referendum for payment in full of the deficiency. Full payment was made in September 1955, thereby further reducing tribal funds by $2,268,240.

85. On February 24, 1956, the Department of the Interior reported "no objection" to enactment of H.R. 6218, 84th Cong., to amend the Menominee Termination Act by providing for payment of termination planning costs out of federal rather than tribal funds. In that report the Department recited the Menominee funds had shrunk from the $9,960,895 in the Federal Treasury as of the date of enactment of the Termination Act to $2,150,000 in less than a year's time. The Department further reported that cash receipts for the same period had not covered tribal obligations, and that federal funds were required for roads, schools and adult education. The report blamed the Menominees for voting themselves full per capita distributions although the Department had "urged the tribe to disburse no more than half *** in order to protect the tribe's financial position." The Department did not suggest that the tribe's quickly realized financial instability and the members' inability to perceive the dangers of disbursing so great a portion of the tribe's capital indicated a need for reconsidering the Menominee "readiness for termination." Yet the tribal bank balance in 1954 had been one of the primary factors on which Congress had relied in concluding that federal supervision of tribal affairs was no longer required.

86. As early as 1956 defendant was aware of the fact that the Menominee Tribe's bank balance had been drastically reduced by the described per capita distributions and by losses. At a hearing held before the House Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, February 27, 1956, Mr. James Frechette, Chairman of the Menominee Tribal Council, testified:

> *** Taking five of the most recent fiscal years, we show this picture:

> In 1951 the profits from the mill and logging were $811,150; stumpage payments were $306,777; the Agency budget was $345,700; and the gain was $178,673.
>
> In 1952 the profits from mill and logging were $589,550; stumpage payments were $175,000; the Agency budget was $496,000; and the loss was $81,450.
>
> In 1953, the profits from the mill and logging were $538,900; the stumpage payments were $85,000; the Agency budget was $1,043,197, which includes $550,000 for construction of new school and renovation of hospital; and the loss was $589,297.
>
> In 1954, the profits from the mill and logging were $517,600; the stumpage payments were $52,000; the Agency budget was $488,500; and the loss was $22,900.
>
> In 1955, profits from the mill and logging were $509,700; stumpage payments were $421,200; the agency budget was $455,000; and the loss was $366,500.
>
> Our capital, which was approximately $10 million only two years ago is now down to $2,276,849.06.

87. At the same Congressional hearing Acting Commissioner of Indian Affairs William Zimmerman also testified. He pleaded with the committee to review the Congressional decision to terminate the Menominees. He said:

> The condition, and particularly the financial condition of the Menominee Tribe, is very different from what it was when the Congress had before it the termination bill.
>
> * * *

My plea to the committee, therefore, is that this situation does require review. It has changed materially from the facts that were before you several years ago. I personally would like to see the formula adopted in Mr. Reuss's bill that any plan that should be considered now would be a plan that would be approved, or drafted first, by the Tribe, and then be approved by the State and by the Department of the Interior. That seems to me a reasonable, workable formula, and it would certainly set a splendid precedent for dealing with this kind of situation in the future.

88. On July 26, 1960, 9 months prior to termination, the Menominee General Council passed a resolution, addressed to the Secretary of the Interior. It charged that negligence had been involved in a recent remodeling of the tribal hospital, a project that had cost the tribe between $250,000 and $350,000. Two months later Area Director Holtz wrote to the Bureau Chief of Plant Design Construction. He stated:

> Ten violations of the State building code are listed on the first two pages of the report. Other matters covered concern practices of personnel, etc., rather than the condition of the physical plant. The $50,000 estimate of the costs of remedying the defects of the physical plant is apparently an informal estimate, which may or may not be approximately correct. An appraisal of the costs should be made by persons qualified to make an estimate, if the hospital is to continue in operation after termination.

89. However, on May 11, 1961, Acting Commissioner of Indian Affairs John O. Crow rejected the resolution of the Menominee General Council. He concluded that it had not been the intent of the Menominees in 1953 when

the Menominees were still wards of the defendant that the remodeling undertaken by the Bureau comply with state requirements and that such compliance would have been too expensive to be feasible or reasonable. He rejected a tribal request that the Interior Department bring the hospital up to Wisconsin standards. The net result was that tribal funds expended for the remodeling were wasted and that the Menominees lost their hospital for failure to qualify under state standards following termination.

90. On January 20, 1965, the Menominee Tribe summarized developments of MISC during the 4 years following the end of federal supervision. The report observed that serious handicaps had been an inadequate tax base (in 1965, $16,885,000); the high costs of tubercular incidence, which totaled $165,578 for 1963 and 1964; and "a high ratio of welfare and correction costs most probably due to low level income, lack of adequate job training, school dropouts and delinquency." In 1962, the first year following termination, the property tax bill for Menominee Enterprises, Inc. totaled $480,864. In 1963, the figure dropped to $233,000; but it rose to $408,000 in 1965, due largely to increased school taxes. In the years 1961-1964, $1,500,000 was spent to redevelop and modernize the industrial plant, rolling stock and equipment, and in furtherance of the forest management plan. In addition, the non-operating burden of property taxes and bond interest during this period, totaled $2,400,000. It was further reported that the average net earnings of Menominee Enterprises, Inc. from 1962 to 1964 were $654,000 before property taxes and bond interest. In 1964 earnings were $692,000. Improvement was expected in 1965, but the income would have had to total $780,000 just to cover the property tax bill of $408,000 plus bond interest of $372,000. This

was a profit level which could not possibly be realized and a net loss was therefore reported as inevitable. Efforts to bring new industry into Menominee County had failed because property taxes, already high, were increasing; local work forces were inadequately trained; and local facilities for housing, stores, and other commercial enterprises were lacking, there being no local funds for such purposes. The report recommended that a request be made to the Congress for $250,000 in federal aid for school purposes; $405,500 for sewer and water development to improve sanitation and health conditions; $100,000 per year for the fight against tuberculosis from 1966 to 1970; and for a low interest rate long-term loan to Menominee Enterprises, Inc. to finance development and to redeem Menominee stock.

91. This deterioration in the condition of the Menominees was reported to the Senate on March 25, 1965 by Senator Proxmire who stated that:

> I must report, regretfully, that the consequences (of termination) for this Wisconsin tribe have been very bad, in spite of the fact that the state of Wisconsin and its university has tried to help the Menominees. The Menominees have suffered greatly. They are poor. Many are unemployed. The health of these Indians has suffered seriously.
>
> This is the Nation which at one time controlled a large portion of Wisconsin, and with which we made a treaty under which one small primeval area of Wisconsin was to remain as their territory.

Declaring that "this proud tribe is gradually and painfully disintegrating," Senator Proxmire entered into the record an article from the Milwaukee Sentinel reporting that the average Menominee family of five subsisted on

an annual income of $2,300; one out of seven was on welfare; and a third were subsisting on federal food surplus distributions. The reporter observed that:

> More and more, the young Indians of Menominee County are leaving the land of their ancestors to survive.

92. The Bureau of Indian Affairs took cognizance of the deteriorating Menominee situation in June 1965. It issued a report acknowledging that the "conditions prevailing among the Menominee * * * have been a cause of widespread and growing concern * * *" and noted that Wisconsin Governor Reynolds had ordered a general attack on "'the severe economic, educational and health problems of Menominee County.'" The report referred to the bills introduced in Congress by Senators Nelson and Proxmire requesting federal aid for the Menominees.

93. Also in a 1965 report to the Committee on Appropriations, House of Representatives, by the Bureau of Indian Affairs entitled, "The Status of the Termination of the Menominee Indian Tribe," the Bureau acknowledged that termination of the Menominee Tribe was "ill advised." The report states that as late as 1959 –

> * * * [T]he Wisconsin Legislature memorialized Congress to repeal or amend the law so as to continue the trust relationship indefinitely, expressing the opinion that termination was seriously premature. * * *

The report further states that in an effort to avoid premature termination, two bills had been introduced in Congress in 1961. One of the bills, "* * * would have authorized postponement of termination to a date found by the Secretary of the Interior to be reasonable. The other would have postponed the termination date to 1969 at the latest. * * *"

Assistant Secretary of the Interior Carver had testified at the hearings for the Department of the Interior in support of the two bills. The report goes on to state:

> In so doing, he [Carver] also accurately forecast the difficulties that have caused the Appropriations Committee to request the present report.

94. The BIA report described in detail the problems and difficulties facing the Menominees by reason of premature termination highlighting such facts as their low income, high unemployment, large families, substandard education, critically substandard housing, poor health, and welfare problems. Menominee County was the smallest and poorest in Wisconsin. The report concludes:

> The term, "pockets of poverty," has come into general use only since 1961. It is trenchantly and accurately descriptive of a sorry phenomenon of modern American life. Menominee County is a "pocket of poverty."
>
> * * * * *
>
> The foregoing review of developments in Menominee County since termination of the Federal trust in 1961 makes it clear how ill-advised were the terms on which the Menominees were deprived of Federal services and supervision.* * *

These conditions and developments were predictable. They had in fact been predicted.

95. On August 4, 1961, Wisconsin Governor Gaylord A. Nelson wrote Senator Clinton Anderson as Chairman of the Subcommittee on Indian Affairs, as a followup to a discussion the two had just prior to termination, with regard to federal assistance for the Menominees. The Governor observed:

> * * * At that time I had hoped we might secure some positive assurance that some substantial phase-

> out monies would be available from the federal government to carry them through this transition period and give them an opportunity to rehabilitate their mill and take over all the ordinary governmental responsibilities connected with running the county. I believe it was your feeling that you would rather await the final termination date before giving consideration to the question of phase-out monies, although it was my understanding that you felt it might very well be possible to give them some assistance.
>
> They now, of course, have been terminated, and I have appointed all of the county officers and established their salaries and a professional mill manager has been hired. Nevertheless, the present situation is very serious, with some substantial unemployment problems; and I am genuinely concerned that this enterprise may not succeed unless we can secure help for them in the very near future. * * *
>
> There is in fact a present need for financial aid. Services in the fields of health, welfare and education which can be provided under H.R. 4130 are absolutely essential to the Menominee community. The principal source of revenue in the community for these essential tax-supported services is Menominee Enterprises, Inc. Unfortunately, due to the present economic situation, the Menominee corporation is the key to the future success of the Menominee Indians. It is my firm belief that if the corporation fails, it will mean the financial ruin of the Menominee people and certain failure for the termination program.
>
> It is respectfully submitted that there is a Federal self-interest and a Federal responsibility in the success of the Menominee Termination Program. Federal responsibility for the welfare of these people does not end merely by occurrence of a statutory

deadline. The present economic problems on the reservation resulting from the health, education and welfare problems *are a consequence of the pre-termination situation.* Accordingly, there is a Federal responsibility to provide an economic program of orderly-phased withdrawal of Federal economic assistance. As Attorney General John W. Reynolds pointed out in his testimony before the Senate Subcommittee on Indian Affairs, *one cannot take people out of an institution in which they and their forefathers have lived all of their lives and then claim that the operator of the institution has no responsibility for what happens to them thereafter.* [Emphasis supplied.]

96. Dr. Orfield's findings are also addressed to the initial 3-year period following termination. He found huge problems resulting from the fact that the new management at MEI had inherited a 50-year old plant, without needed improvements. MEI faced huge inventories and a depressed lumber market, plus the burdens of supporting a new local government. Termination planning had been based upon a dramatic increase in annual production, but the new managers found that the mill's shipping capacity was "far below that needed for a profitable operation making full use of harvestable timber."

The individual Menominee was surprised to find that he was now required to pay market value for the individual parcel of land he occupied, but was without the necessary cash to purchase it. They surrendered their MEI income bonds in lieu of cash. MEI, fighting for survival, initiated management policies which the Indians found it difficult to accept. Severe tensions developed between the tribe and its own leaders in MEI. This was confirmed by Wisconsin Assistant Attorney General Bowers' visit to the reservation on June 12, 1962. He

found morale the lowest in memory, largely due to the Indians' fear of MEI and its management. MEI was, in any event, controlled by non-Indians.

97. MEI decided to dispose of the Menominee electric plant to Wisconsin Power and Light and this produced a heated dispute. Tribal members unsuccessfully sought an injunction to halt the sale.

98. The fundamental goal of termination, namely, to give the Indians control of their property, was frustrated by the acquisition of an inefficient, outmoded sawmill and the need to assume responsibility at the same time for providing governmental services in the face of exhausted capital reserves required for capital investment.

99. The individual obligation to pay taxes for the first time, and to absorb the cost of health care, utilities and other services formerly provided by the community, resulted in discontinuance of water and electrical services for a number of families. Dr. Orfield reported that more than 300 families had paid no property taxes since termination and that at least 1,000 MEI income bonds had been wholly or partially assigned for land or welfare payments. Some Menominees were in danger of losing their homes for failure to pay for land, or for taxes levied on the land.

100. Dr. Orfield further observed that:

> Over the protest of the Interior Department, Congress acted in 1956 to require permanent sustained-yield management of the tribal forest. *This action reduced the market value of the Menominee forest by more than 60 percent.* The practical effect of the amendment was to limit tribal freedom in two important respects: liquidation of the forest was made far less attractive, and the tribe was forbidden to take the option of clear-cutting the forest for a

quick profit at some future date. Later, the Interior Department further limited the tribe's choices by informally notifying the tribal negotiating committee that a plan for sale of the forest would not be considered approvable. *Finally, the Wisconsin legislature refused to enact the legislation required by the tribe until delegates finally accepted a 30-year restrictive covenant, forbidding the sale or mortgage of tribal property without state consent.*

Tribal control was not only limited by law, but was also curtailed by the plan for business organization. In no sense can it be said that the tribe made a free choice in favor of this plan. * * * The plan was presented to the general council shortly before the deadline, with inadequate explanation, and with no time to prepare an alternative. The tribe did not decide that this was the best plan, but only that it was better to submit a plan than to be placed under a trustee by the Secretary of the Interior. Later, this same argument was used in the election of the Voting Trustees.

The complicated document, which few began to understand, provided no chance to revise the initial decision. Control of the business was to be completely out of the hands of Menominee stockholders for at least 10 years. The First Wisconsin Trust Company was given full control of a decisively large bloc of stock. *In the end, tribal members had far less control than before termination.* Under federal trusteeship, the elected Advisory Council and the people in the general council exercised control over budgetary decisions and decisive influence over the tenure of business managers and reservations superintendents. Today, these decisions are made by a Board of Directors controlled by non-Menominees. [Emphasis supplied.]

101. Many Menominees were outraged by a 1962 ruling of Attorney General Reynolds that state game laws were to be enforced in Menominee County. By treaty, tribal members had been granted the right to hunt and fish throughout the year. Litigation on this issue was eventually carried to the U.S. Supreme Court which held that Menominee hunting and fishing rights had survived the Termination Act. Later, as Governor Reynolds, he was appalled at the conditions found to exist on the Menominee Reservation. He stated:

> It is incredible that as many as nine active T.B. cases are living in one house, while T.B. sanatoriums sit half empty in the State. It is incredible that the Menominees – poor as they are – are subsidizing other jurisdictions.
>
> It is incredible that there is not a single doctor practicing medicine in Menominee County. It is incredible that practically no Menominee has been able to participate in manpower retraining programs.

102. Dr. Orfield concluded:

While accepting the power to regulate the county, the state government has shown little disposition to assume the federal responsibility for providing assistance to the Menominees. Urgently needed stop-gap assistance has been provided, but there has been little inclination to tackle the underlying problems through a large capital development program. Understandably, Wisconsin has refused to take on a major state responsibility shared by no other state in the nation. Substantial help is needed now, but no one accepts full responsibility for the Menominee community.

* * * * *

Many Menominees still hope that something will happen to change the situation, and most favor

repeal of the termination law. More than 800 members, a majority of the adults, signed the following petition:

> "We the undersigned, members of the MENOMINEE INDIAN TRIBE, do respectfully petition the Congress of the United States to immediately enact legislation which will repeal Public Law 399 of the United States Congress."

The economic position of the tribe was clear long before termination. Through per capita distributions of tribal funds, reserves had declined dangerously by 1956. As the lumber market entered a long decline in 1958, the tribe's position became increasingly precarious. Well before the termination date, it was obvious that only the most optimistic projection of corporate income could show economic viability for the new county. Menominee Enterprises fell far short of this goal, and the tribe now faces economic disaster.

* * *

> In the ten years since passage of the termination act, none of the major goals have been realized. Even if the objectives of assimilation and tax responsibility are eventually realized, the cost will be exorbitant. Taxes will be taken from people unable to pay, and the process of intergration will be begun by people with neither confidence nor skills, at the bottom of the urban slums. Termination was based on a series of false assumptions, and the policy cannot achieve the goals so convincingly set forth in the subcommittee hearing room. The Menominee Tribe is dead, but for no good reason.

103. Many of these conclusions were echoed by Congressman Melvin Laird in his testimony before a House Subcommittee on March 15, 1966, during its consideration of a bill to provide financial assistance to the

Menominees. He testified that the Menominee Indians had deteriorated from "one of the wealthiest tribes in America" to "one of the worst pockets of poverty in the country. During this period the tribe has been forced to deplete its treasury of $10 million and some believe it is on the verge of losing its timber land valued at $35 million."

It was his opinion that:

> *** [A]fter the tribe voted for the "principle" of termination in 1953 against my recommendations (in order to receive their per capita payment), hearings were held and legislation passed in 1954 terminating the Menominee Indians (PL 83-399). It was from this point to the present day that lack of responsibility by the federal government has been a burden and a detriment to the Menominees and those working with them.

104. Congressman Laird pointed out that vital statistics for the tribe had worsened between 1954 and 1964. The birthrate had increased and so had the infant mortality rate. There were fewer full-time jobs in the county. The incidence of tuberculosis had produced a cost 15 times that expected at the time of termination. Median income had risen from $2,300 to only $2,677 in 10 years, and those on welfare programs had increased. His testimony continued as follows:

> *** The federal government did little to help prepare the Menominees for their new responsibilities as a county, the type of post-termination status the tribe chose rather than splitting the reservation among several counties.
>
> As a reservation, the Menominees received little from the federal government. A sanitation aide was provided through the Public Health Service and money was allocated for road work. The tribe sup-

ported its own welfare program, hospital and medical facilities, operated its lumber mill, and paid for the education (as well as scholarships) of its youth. With termination the hospital had to close because it was run by the Catholic church and could not be operated with public money from the county. The welfare program had to come completely under state jurisdiction. The lumber mill was found to have 132 faults which required repairs before the mill could pass state standards. It was expected that there would be a gradual shift of students from the tribally supported parochial schools into joint school district No. 8 of Shawano, of which the county was to become a part. In almost every phase of tribal operations, it was found the reservation was below state standards and regulations.

It would seem that it was then the duty of the federal government to raise the tribal reservation to state standards before turning the area over to Wisconsin. However, efforts were not made (except in road work) and the attitude prevailed that raising the reservation's standards was the problem of the Menominees and the state of Wisconsin.

* * *

*** By any standard, Menominee county residents show the greatest need for increased and better governmental services but simply are not able to capitalize on these programs because of the precarious tax revenue situation which now exists. They can't keep paying $½ million in taxes, with the lumber mill paying 92% of those taxes, and expect the mill to expand its operations and to meet the growing expenses of required government services as well.

* * *

A total estimated cost of $500,000 is needed to complete sanitation projects.

* * *

It should be noted that the mounting of an effective local health program for the residents of the county is seriously impeded by the absence within the boundaries of Menominee county of a hospital, health department, or even a practicing physician or dentist.

* * *

In answer to an argument that there are unique problems with every poverty situation, and Menominee county should not receive special attention, it should be remembered that the historical relationship of the Menominees with the federal government does make it a much more special case. Not only as a reservation, but as the first major tribe to be terminated and turned into a county, the Menominees have had a "special" relationship with the federal government. As such, the Indians need "special" consideration because of the unusual problems resulting from that federal termination.

* * *

As it stands now, the Menominee termination has served as an example of federal mismanagement and causes apprehension among many tribes when plans of progress are suggested to them.

105. Congressman Laird did not believe that "the Federal Government once it legally terminates its responsibility for the welfare for an Indian tribe, can then abruptly wash its hands of the whole affair. ***

* * *

A sizeable number of Menominees persist in the view not only that termination was unwise, but that it was forced upon the tribe without full discussion or understanding, and that it constitutes a gross violation of treaty rights. The highly vocal exponents of these views are few in number but such opinions may be shared by a substantial

number who do not attend public discussions or who remain silent. A related viewpoint is that termination may have been technically legal, but that the Federal Government cut off its services too abruptly and before all appropriate Federal investment in community facilities had been completed.

In April 1964 a petition for repeal of the Menominee Termination Act was addressed to the Congress carrying signatures of 788 persons identifying themselves as Menominee Indians. A duplicate set was sent to the President and receipt was acknowledged by the Bureau of Indian Affairs. ***

He concluded by stating that:

The foregoing review of development in Menominee County since termination of the Federal trust in 1961 makes clear how ill-advised were the terms on which the Menominees were deprived of Federal services and supervision. ***

106. Similar conclusions have been voiced and published by others. On June 15, 1971, Senator George McGovern, commenting on "the folly of the now rejected policy of termination of our Indian citizens," expressed the opinion that:

> *** Had we given the Menominees of Wisconsin a voice in their fate, for example, they would not have been terminated but instead would be flourishing.

Newspaper accounts of the failure of the termination policy applied to the Menominees, refer to them as "guinea pigs" in a social experiment loaded with good intentions. Articles are, for example, headlined "Last Rites For an Indian Nation," and "The Menominee: Victims of Experiment," and "Pocket of Poverty."

107. On July 8, 1970, the President of the United States formally urged repudiation of House Concurrent Resolution 108 of August 1953 to the effect that termination of Indian tribes was the long range goal of the Congress. He stated:

> This policy of forced termination is wrong, in my judgment, for a number of reasons. First, the premises on which it rests are wrong. Termination implies that the Federal government has taken on a trusteeship responsibility for Indian communities as an act of generosity toward a disadvantaged people and that it can therefore discontinue this responsibility on a unilateral basis whenever it sees fit. But the unique status of Indian tribes does not rest on any premise such as this. The special relationship between Indians and the Federal government is the result instead of solemn obligations which have been entered into by the United States Government. Down through the years, through written treaties and through formal and informal agreements, our government has made specific commitments to the Indian people. For their part, the Indians have often surrendered claims to vast tracts of land and have accepted life on government reservations. In exchange, the government has agreed to provide community services such as health, education and public safety, services which would presumably allow Indian communities to enjoy a standard of living comparable to that of other Americans.
>
> This goal, of course, has never been achieved. But the special relationship between the Indian tribes and the Federal government which arises from these agreements continues to carry immense moral and legal force. To terminate this relationship would be no more appropriate than to terminate the citizenship of any other American.

The second reason for rejecting forced termination is that the practical results have been clearly harmful in the few instances in which termination actually has been tried. The removal of Federal trusteeship responsibility has produced considerable disorientation among the affected Indians and has left them unable to relate to a myriad of Federal, State and local assistance efforts. Their economic and social condition has often been worse after termination than it was before.

Because termination is morally and legally unacceptable, because it produces bad practical results, and because the mere threat of termination tends to discourage greater self-sufficiency among Indian groups, I am asking the Congress to pass a new Concurrent Resolution which would expressly renounce, repudiate and repeal the termination policy as expressed in House Concurrent Resolution 108 of the 83rd Congress. ***

Ultimate Findings on "General Background and History of the Menominee Termination Act; Relationship Between the Parties; Consequences of Termination of That Relationship."

108. The Menominee Termination Act was initiated by the United States, in the interests of the United States. It was not in the best interests of the Menominees as a tribe nor as individual Indians that the federal trusteeship be terminated. Termination policy was initiated by the United States in order to "get out of the Indian business" and to reduce costs, specifically within the Bureau of Indian Affairs.

109. The Menominee Tribe and its members did not effectively consent to termination of federal supervision and trusteeship over the tribe, its members, and its assets.

110. Termination was not warranted under any of the four criteria established by Acting Commissioner of Indian Affairs Zimmerman. Defendant failed to apply the criteria which it enunciated. Adequate studies were not made and had they been made in advance, they would have demonstrated that the Menominee did not meet those criteria for termination.

111. Following passage of the Termination Act in 1954, defendant failed to adequately assist the Menominees to prepare for final termination which became effective in 1961.

112. During the period 1954-1961 it became apparent that the Menominees were not prepared for termination and that the tribe and its assets would suffer harmful consequences if a termination policy was implemented. There was, nevertheless, no reappraisal of the policy of termination.

113. The Menominees were not trained to assume the extensive responsibilities imposed upon them by involuntary termination. They were not trained in self-government, nor to assume supervisory management or sub-management positions with respect to the Menominee Forest or sawmill operations.

114. If termination was to be imposed on the Menominee Tribe, it required a period of from one to two generations (20-40 years), of phased withdrawal from federal supervision, to effect the transition without serious damage to the tribe.

115. Failure of the defendant to prepare the tribe for termination, and the imposition of termination without the necessary preparation, constituted an abrogation of defendant's fiduciary obligations grow-

ing out of its treaty and trust relationship to the Menominee Tribe and its members. Defendant's acts and omissions constitute breach of a fiduciary duty owed to plaintiffs.

APPENDIX C

FUTURE INDIAN CLAIMS

Section 24. The jurisdication of the Court of Claims is hereby extended to any claim against the United States accruing after the date of the approval of this Act in favor of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws, treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band or group. In any suit brought under the jurisdiction conferred by this section the claimant shall be entitled to recover in the same manner, to the same extent, and subject to the same conditions and limitations, and the United States shall be entitled to the same defenses, both at law and in equity, and to the same offsets, counterclaims, and demands, as in cases brought in the Court of Claims under section 145 of the Judicial Code (36 Stat. 1136; 28 U.S.C., sec. 250), as amended: *Provided, however,* That nothing contained in this section shall be construed as altering the fiduciary or other relations between the United States and the several Indian tribes, bands, or groups.

APPENDIX D

§ 1491. Claims against United States generally; actions involving Tennessee Valley Authority

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States. To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just.

Nothing herein shall be construed to give the Court of Claims jurisdiction in suits against, or founded on actions of, the Tennessee Valley Authority, nor to amend or modify the provisions of the Tennessee Valley Authority Act of 1933, as amended, with respect to suits by or against the Authority.

(June 25, 1948, ch. 646, 62 Stat. 940; July 28, 1953, ch. 253, § 7, 67 Stat. 226; Sept. 3 1954, ch. 1263, § 44 (a), (b), 68 Stat. 1241; July 23, 1970, Pub. L. 91-350, § 1(b), 84 Stat. 449; Aug. 29, 1972, Pub. L. 92-415, § 1, 86 Stat. 652.)

APPENDIX E

MENOMINEE TRIBE OF WISCONSIN: TERMINATION OF FEDERAL SUPERVISION

§ 891. Purpose

The purpose of sections 891-902 of this title is to provide for orderly termination of Federal supervision over the property and members of the Menominee Indian Tribe of Wisconsin. June 17, 1954, c. 303, § 1, 68 Stat. 250.

§ 892. Definitions

For the purposes of sections 891-902 of this title–

(a) "Tribe" means the Menominee Indian Tribe of Wisconsin;

(b) "Secretary" means the Secretary of the Interior. June 17, 1954, c. 303, § 2, 68 Stat. 250.

§ 893. Membership roll; closure; applications for enrollment; approval or disapproval of application; appeal; finality of determination; final publication; certificates of beneficial interest

At midnight of June 17, 1954 the roll of the tribe maintained pursuant to the Act of June 15, 1934 (48 Stat. 965), as amended by the Act of July 14, 1939 (53 Stat. 1003), shall be closed and no child born thereafter shall be eligible for enrollment: *Provided*, That applicants for enrollment in the tribe shall have three months from the date the roll is closed in which to submit applications for enrollment: *Provided further*, That the tribe shall have three months thereafter in which to approve or disapprove any application for enrollment: *Provided further*, That any applicant whose application is not approved by the tribe within six months from

June 17, 1954 may, within three months thereafter, file with the Secretary an appeal from the failure of the tribe to approve his application or from the disapproval of his application, as the case may be. The decision of the Secretary on such appeal shall be final and conclusive. When the Secretary has made decisions on all appeals, he shall issue and publish in the Federal Register a Proclamation of Final Closure of the roll of the tribe and the final roll of the members. Effective upon the date of such proclamation, the rights or beneficial interests of each person whose name appears on the roll shall constitute personal property and shall be evidenced by a certificate of beneficial interest which shall be issued by the tribe. Such interests shall be distributable in accordance with the laws of the State of Wisconsin. Such interests shall be alienable only in accordance with such regulations as may be adopted by the tribe. June 17, 1954, c. 303, § 3, 68 Stat. 250.

§ 894. Per capita payments to tribal members

The Secretary is authorized and directed, as soon as practicable after June 17, 1954, to pay from such funds as are deposited to the credit of the tribe in the Treasury of the United States $1,500 to each member of the tribe on the rolls of the tribe on June 17, 1954. Any other person whose application for enrollment on the rolls of the tribe is subsequently approved, pursuant to the terms of section 893 of this title, shall, after enrollment, be paid a like sum of $1,500: *Provided*, That such payments shall be made first from any funds on deposit in the Treasury of the United States to the credit of the Menominee Indian Tribe drawing interest at the rate of 5 per centum, and thereafter from the Menominee judgment fund, symbol 14X7142. June 17, 1954, c. 303, § 5, 68 Stat. 251.

§ 895. Management specialists: studies and reports; availability of funds; reimbursement of expenditures

The tribe is authorized to select and retain the services of qualified management specialists, including tax consultants, for the purpose of studying industrial programs on the Menominee Reservation and making such reports or recommendations, including appraisals of Menominee tribal property, as may be desired by the tribe, and to make other studies and reports as may be deemed necessary and desirable by the tribe in connection with the termination of Federal supervision as provided for hereinafter. Such reports shall be completed not later than February 1, 1959. Such specialists are to be retained under contracts entered into between them and authorized representatives of the tribe, subject to approval by the Secretary. Such amounts of Menominee tribal funds as may be required for this purpose shall be made available by the Secretary. In order to reimburse the tribe, in part, for expenditures of such tribal funds as the Secretary deems necessary for the purposes of carrying out the requirements of this section, there is authorized to be appropriated out of any money in the Treasury not otherwise appropriated, an amount equal to all of such expenditures incurred prior to July 2, 1958, plus one-half of such expenditures incurred thereafter, or the sum of $275,000, whichever is the lesser amount. June 17, 1954, c. 303, §6, 68 Stat. 251; July 14, 1956, c. 601, 70 Stat. 544; July 2, 1958, Pub. L. 85–488, §1(a), 72 Stat. 290.

§ 896. Plan for control of tribal property and service functions; termination of Federal supervision and services; approval of plan; publication in Federal Register

The tribe shall as soon as possible and in no event later than February 1, 1959, formulate and submit to the Secretary a plan for the future control of the tribal property and service functions now conducted by or under the supervision of the United States, including but not limited to services in the fields of health, education, welfare, credit, roads, and law and order, and for all other matters involved in the withdrawal of Federal supervision. The Secretary is authorized to provide such reasonable assistance as may be requested by officials of the tribe in the formulation of the plan heretofore referred to, including necessary consultations with representatives of Federal departments and agencies, officials of the State of Wisconsin and political subdivisions thereof, and members of the tribe. The Secretary shall accept such tribal plan as the basis for the conveyance of the tribal property if he finds that it will treat with reasonable equity all members on the final roll of the tribe prepared pursuant to section 893 of this title, and that it conforms to applicable Federal and State law. In the event the tribe fails to submit a plan approvable under the terms of sections 891-902 of this title by February 1, 1959, the Secretary shall cause such a plan to be prepared and submitted to the tribe within three months thereafter. The tribe shall thereafter have three months within which to accept the plan of the Secretary or to submit to the Secretary tribal proposals for modification. If the Menominee Tribe and the Secretary cannot agree upon a plan within the aforementioned six-month period, or if they agree upon a plan within such period and the tribal corporation and voting trust contemplated by the plan are not established prior to March 1, 1961, the Secretary shall transfer the tribal property to a trustee of his choice for the management or disposition for the benefit of the Menominee Tribe. The

responsibility of the United States to furnish all such supervision and services to the tribe and to the members thereof, because of their status as Indians, shall cease on April 30, 1961, or on such earlier date as may be agreed upon by the tribe and the Secretary. The plan shall contain provision for protection of the forest on a sustained yield basis and for the protection of the water, soil, fish and wildlife. To the extent necessary, the plan shall provide for such terms of transfer pursuant to section 897 of this title, by trust or otherwise, as shall insure the continued fulfillment of the plan. The Secretary, after approving the plan, shall cause the plan to be published in the Federal Register. The sustained yield management requirement contained in sections 891-902 of this title, and the possible selection of a trustee in the event of a tribal planning default, shall not be construed by any court to impose a financial liability on the United States. July 17, 1954, c. 303, §7, 68 Stat. 251; July 14, 1956, c. 604, §1, 70 Stat. 549; July 2, 1958, Pub.L. 85–488, §1(b), 72 Stat. 290; Sept. 8, 1960, Pub.L. 86–733, §1, 74 Stat. 867.

§897. Transfer of property

On or before April 30, 1961, the Secretary is authorized to transfer to the tribal corporation or to a trustee of the Secretary's choice, as provided in section 896 of this title, the title to all property, real and personal, held in trust by the United States for the tribe. The Secretary is directed to begin immediate negotiations with a private trustee of his choice to perfect a trust agreement so that if by March 1, 1961, the tribal corporation is not functioning, the Secretary will be prepared to transfer title to such property to said trustee as soon after March 1, 1961, as possible, but in no event later than April 30, 1961. The Secretary is authorized, in his discretion, to

transfer to the tribe or any member or group of members thereof any federally owned property acquired, withdrawn, or used for the administration of the affairs of the tribe which he deems necessary for Indian use, or to transfer to a public or nonprofit body any such property which he deems necessary for public use and from which members of the tribe will derive benefits. June 17, 1954, c. 303, §8, 68 Stat. 252; July 14, 1956, c. 604, §2, 70 Stat. 550; July 2, 1958, Pub.L. 85–488, §1(c), 72 Stat. 291; Sept. 8, 1960, Pub.L. 86–733, §2, 74 Stat. 867.

§898. Taxes, initial exemption; taxes following distribution; valuation for income tax on gains or losses

No distribution, conveyance, or transfer of title to assets and no issuance or distribution of securities pursuant to the plan approved by the Secretary under the provisions of sections 891-902 of this title shall be subject to any Federal or State transfer, issuance, or income tax: *Provided*, That nothing contained in sections 891-902 of this title shall exempt the recipient of any cash distribution made hereunder from payment of income tax for the year in which the distribution is made on that portion of his share thereof which consists of interest on funds deposited in the Treasury of the United States pursuant to the Supplemental Appropriation Act, 1952 (65 Stat. 736, 754). Following any distribution, conveyance, transfer, or issuance as aforesaid, the assets and securities which are held by, and any income derived therefrom which is received by or payable to, any person, or any corporation or organization as provided in section 897 of this title, shall be subject to the same taxes, State and Federal, as in the case of non-Indians, except that the basis of any valuation for purposes of Federal income tax

on gains or losses shall be the value of the property on the date title is transferred by the United States pursuant to section 897 of this title. June 17, 1954, c. 303, § 9, 68 Stat. 252; Sept. 8, 1960, Pub. L. 86-733, § 3, 74 Stat. 867.

§ 899. Publication of proclamation of transfer of property; termination of Federal services; application of Federal and State laws; citizenship status unaffected

When title to the property of the tribe has been transferred, as provided in section 897 of this title, the Secretary shall publish in the Federal Register an appropriate proclamation of that fact. Thereafter individual members of the tribe shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians, all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jursidiction. Nothing in sections 891-902 of this title shall affect the status of the members of the tribe as citizens of the United States. June 17, 1954, c. 303, § 10, 68 Stat. 252.

§ 900. Protection of minors, persons non compos mentis and other members needing assistance; guardians; other adequate means

Prior to the transfer pursuant to section 897 of this title, the Secretary shall protect the rights of members of the tribe who are less than eighteen years of age, non compos mentis, or in the opinion of the Secretary in need of assistance in conducting their affairs, by causing the appointment of guardians for such members in courts

of competent jursidiction, or by such other means as he may deem adequate. June 17, 1954, c. 303, § 11, 68 Stat. 252.

§ 901. Rules and regulations

The Secretary is authorized and directed to promulgate such rules and regulations as are necessary to effectuate the purposes of sections 891-902 of this title. June 17, 1954, c. 303, § 12, 68 Stat. 252.

§ 902. Contracts for completion of vocational or undergraduate college program

Notwithstanding any other provision of sections 891-902 of this title, the Secretary of the Interior is authorized to contract with the Wisconsin Department of Public Instruction, prior to the date for terminating Federal responsibilities, for the completion of a vocational or undergraduate college program of any member of the Menominee tribe who has been accepted for such program prior to the termination date. June 17, 1954, c. 303, § 14, as added Sept. 8, 1960, Pub.L. 86–733, § 4, 74 Stat. 867.

APPENDIX F

TREATY WITH THE MENOMINEE, 1854.

Articles of agreement made and concluded at the Falls of Wolf River, in the State of Wisconsin, on the twelfth day of May, one thousand eight hundred and fifty-four, between the United States of America, by Francis Huebschmann, superintendent of Indian affairs, duly authorized thereto, and the Menomonee tribe of Indians, by the chiefs, headmen, and warriors of said tribe—such articles being supplementary and amendatory to the treaty made between the United States and said tribe on the eighteenth day of October, one thousand eight hundred and forty-eight.

Whereas, among other provisions contained in the treaty in the caption mentioned, it is stipulated that for and in consideration of all the lands owned by the Menomonees, in the State of Wisconsin, wherever situated, the United States should give them all that country or tract of land ceded by the Chippewa Indians of the Mississippi and Lake Superior, in the treaty of the second of August, eighteen hundred and forty-seven, and by the Pillager band of Chippewa Indians in the treaty of the twenty-first of August, eighteen hundred and forty-seven, which had not been assigned to the Winnebagoes, guarantied not to contain less than six hundred thousand acres; should pay them forty thousand dollars for removing and subsisting themselves; should give them fifteen thousand dollars for the establishment of a manual-labor school, the erection of a grist and saw mill, and for other necessary improvements in their new country; should cause to be laid out and expended in the hire of a miller, for the period of fifteen years, nine thousand dollars; and for continuing and keeping up a

blacksmith shop and providing iron and steel for twelve years, commencing on the first of January, eighteen hundred and fifty-seven, eleven thousand dollars.

And whereas, upon manifestation of great unwillingness on the part of said Indians to remove to the country west of the Mississippi River, upon Crow Wing, which had been assigned them, and a desire to remain in the State of Wisconsin, the President consented to their locating temporarily upon the Wolf and Oconto Rivers.

Now, therefore, to render practicable the stipulated payments herein recited, and to make exchange of the lands given west of the Mississippi for those desired by the tribe, and for the purpose of giving them the same for a permanent home, these articles are entered into.

ARTICLE 1. The said Menomonee tribe agree to cede, and do hereby cede, sell, and relinquish to the United States, all the lands assigned to them under the treaty of the eighteenth of October, eighteen hundred and forty-eight.

ARTICLE 2. In consideration of the foregoing cession the United States agree to give, and do hereby give, to said Indians for a home, to be held as Indian lands are held, that tract of country lying upon the Wolf River, in the State of Wisconsin, commencing at the southeast corner of township 28 north of range 16 east of the fourth principal meridian, running west twenty-four miles, thence north eighteen miles, thence east twenty-four miles, thence south eighteen miles, to the place of beginning—the same being townships 28, 29, and 30, of ranges 13, 14, 15, and 16, according to the public surveys.

ARTICLE 3. The United States agree to pay, to be laid out and applied under the direction of the President, at

the said location, in the establishment of a manual-labor school, the erection of a grist and saw mill, and other necessary improvements, fifteen thousand dollars; in procuring a suitable person to attend and carry on the said grist and saw mill, for a period of fifteen years, nine thousand dollars, in continuing and keeping up a blacksmith shop, and providing the usual quantity of iron and steel for the use of said tribe, for a period of twelve years, commencing with the year eighteen hundred and fifty-seven, eleven thousand dollars; and the United States further agree to pay the said tribe, to be applied under the direction of the President, in such manner and at such times as he may deem advisable, for such purposes and uses as in his judgment will best promote the improvement of the Menomonees, the forty thousand dollars stipulated to be applied to their removal and subsistence west of the Mississippi. It being understood that all other beneficial stipulations in said treaty of 1848 are to be fulfilled as therein provided.

ARTICLE 4. In consideration of the difference in extent between the lands hereby ceded to the United States, and the lands given in exchange, and for and in consideration of the provisions hereinbefore recited, and of the relinquishment by said tribe of all claims set up by or for them, for the difference in quantity of lands supposed by them to have been ceded in the treaty of eighteenth of October, eighteen hundred and forty-eight, and what was actually ceded, the United States agree to pay said tribe the sum of two hundred and forty-two thousand six hundred and eighty-six dollars, in fifteen annual instalments, commencing with the year 1867; each instalment to be paid out and expended under the direction of the President of the United States, and for such objects, uses, and purposes, as he shall judge

necessary and proper for their wants, improvement, and civilization.

ARTICLE 5. It is further agreed that all expense incurred in negotiating this treaty shall be paid by the United States.

ARTICLE 6. This treaty to be binding on the contracting parties as soon as it is ratified by the President and Senate of the United States, and assented to by Osh-kosh and Ke-she-nah, chiefs of said tribe.

In testimony whereof, the said Francis Huebschmann, superintendent as aforesaid, and the chiefs, headmen, and warriors of the said Menomonee tribe, have hereunto set their hands and seals, at the place and on the day and year aforesaid.

Francis Huebschmann, [L. S.]
Superintendent of Indian affairs.

Wau-ke-chon, his x mark. [L. S.]
Wis-ke-no, his x mark. [L. S.]
Way-tan-sah, his x mark. [L. S.]
Carron, his x mark. [L. S.]
Sho-ne-niew, his x mark. [L. S.]
Lamotte, his x mark. [L. S.]
Pe-quo-quon-ah, his x mark. [L. S.]
Shaw-poa-tuk, his x mark. [L. S.]
Wau-pen-na-nosh, his x mark. [L. S.]
Sho-ne-on, his x mark. [L. S.]
Shaw-wan-na-penasse, his x mark. [L. S.]
Ta-ko, his x mark. [L. S.]
Ko-man-ne-kin-no-shah, his x mark. [L. S.]
Wau-pa-mah-shaew, his x mark. [L. S.]
Auck-ka-na-pa-waew, his x mark. [L. S.]
Ah-way-sha-shah, his x mark. [L. S.]
Chech-e-quon-o-way, his x mark. [L. S.]

Nah-pone, his x mark. [L. S.]
Mo-sha-hat, his x mark. [L. S.]
I-yaw-shiew, his x mark. [L. S.]
Kay way-sot, his x mark. [L. S.]

Signed and sealed in the presence of us:

John V. Suydam, sub-agent,
Chas. A. Grignon, United States interpreter,
H. W. Jones, secretary to the commissioner,
Chas. H. White, deputy United States marshal,
Heman M. Cady, United States timber agent,
William Powell,
John Wiley,
H. L. Murray.

APPENDIX G

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON 25

April 22, 1946

MEMORANDUM for the Commissioner of Indian Affairs.

The following comments are offered for your information with respect to the changes in H.R. 4497 suggested by the Department of Justice.

Before entering upon a point-by-point analysis, I submit the following general observations:

1. Most of the amendments now proposed by the Department of Justice were not mentioned at our conference of March 19, when we thought we were arriving at an informal compromise agreement as to the specific amendments that should be made. In fact, of the 23 or more amendments now suggested by Justice, only four correspond to our informal understanding of March 19. These four amendments, all based on suggestions originally made by the Bureau of the Budget, are listed below as amendments 1, 5, 9, and 13. Apparently the discrepancy is due in part to the fact that the latest Justice Department letter was written by one who was unable to be present at our March 19 conference.

2. The most seriously objectionable of the amendments now newly proposed by Justice, which go to the essence of the Claims Bill, are those relating to the finality of judgments, the disposition of future claims,

and the scope of offsets, listed below, respectively, as amendments 17, 23, and 8. Each of these amendments goes far beyond anything proposed in the Attorney General's report of June 25, 1945.

3. Only slightly less objectionable, in so far as they tend to deprive the proposed bill of the chief grounds of its support, are the suggested amendments eliminating Indian groups other than tribes or bands from the scope of the legislation, limiting the types of claims that may be heard, prohibiting the Commission from hearing claims now pending, or authorized to be brought, in the Court of Claims, eliminating the Investigation Division of the Commission, eliminating appeals to the Supreme Court from legal decisions of the Court of Claims. These amendments are listed below under the numbers 2, 4 and 7, 11, 12, and 21. None of these amendments was suggested in the Attorney General's report of June 25, 1945.

4. The remaining amendments now suggested by the Department of Justice, mostly devoted to terminology and other trivia, are not seriously objectionable in themselves, and I would see no objection to writing them into a Senate draft of legislation and urging that such provisions be substituted in the Conference Committee for the corresponding House provisions. These amendments, however, affecting almost every section of the bill, could not be offered at this time by the Committee or any of its members without seriously endangering the passage of the bill in the House. Congressman Jackson advises me that if his Committee were to suggest more than 3 or 4 amendments, after having unanimously reported the bill and secured a rule thereon, this would be an open invitation for a recommitment of the bill which would practically destroy chances of adoption by the House at

this session. All of these amendments could have been suggested in the original report of the Attorney General or otherwise in the course of the hearings held by the House Committee, and many of them might have been incorporated in the revised bill that was reported out by the Committee. None of them, however, was then proposed by the Attorney General, although it should be noted that several of them were included in the Attorney General's letter to the Budget Bureau commenting on the Interior Department report. It is not likely that the House Committee will be particularly receptive to these proposed changes at this time.

Felix S. Cohen,
Acting Solicitor.

Attachment.

Copy to Mr. Samuel Dodd, Bureau of the Budget (2)
Copy to Mr. Slaughter
Copy to Mr. Flanery
Copy of Attachment to Mr. Frank Chambers,
Department of Justice.

ANALYSIS OF JUSTICE AMENDMENTS

Section 2.

1. In defining the scope of claims that may be heard by the Commission, Justice would substitute the restricted phrase, "the following claims" for the more general language now appearing, "all claims of every nature whatever *** such claims shall include, but shall not be confined to ***." This follows the amendment suggested by the Budget, which was *agreed to* on March 19, except for an omission, perhaps unintentional, of the

words "classes of" at the beginning of line 7, which should be reinserted as in the Budget draft.

2. Justice suggests that in defining the plaintiffs that may appear before the Commission, the words now appearing, "tribe, band, or other identifiable group of American Indians," be amended by cutting out the category "other identifiable group." This suggestion is repeated wherever the phrase appears subsequently in the bill (notable in sections 3(c), 10, 13, and 15, and the suggestion is apparently omitted unintentionally in Section 25). The omission of this phrase might very well be construed to exclude from the scope of the bill Pueblos and other town or village organizations, such as exist among the Creeks and among certain Alaskan Indian and Eskimo groups, which cannot be brought within the definition of "tribe" or "band" without considerable straining. The exclusion of any native group from the scope of this bill would not only be an unfair discrimination but would destroy the main objective of the bill, which is to achieve a final and comprehensive solution of the Indian claims problem. If the bill be amended as Justice suggests, it would always be possible in the future for some Indian group to argue the necessity of additional jurisdictional legislation on the ground that it did not come within the definition of a "tribe" or "band".

3. Justice would change the language used to define the first and second classes of claims (page 1, line 11 to page 2, line 4). I can see no substantial advantage or disadvantage in the suggested new language.

4. Justice would strike from the list of claims which the Commission may hear, categories 3 and 5, which relate respectively to claims based on fraud, duress, mistake, etc., and to claims based upon the taking of lands without compensation. These are grounds which have

repeatedly been recognized and specified in past jurisdictional acts. To exclude them from the scope of the Claims Commission would inevitably result in pleas for further jurisdictional acts for those tribes whose claims might fall within these categories. Undoubtedly Justice contemplates that the claims falling within these categories would be covered under its suggested category of "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity." The generality, however, of this latter phrase, makes it less satisfactory than categories 3 and 5 in the present bill, and it is hard to know whether unfavorable judicial inferences might not be drawn in future litigation from a legislative history which showed the deletion of categories 3 and 5.

5. Justice suggests omitting category 4, dealing with breaches of duty by officers or agents of the United States. This accords with the suggestion made by the Budget Bureau and was *agreed to* by representatives of this Department at our March 19 conference.

6. The language of category 6 (page 2, lines 18-20) would be changed, according to the suggestion of the Department of Justice, so as to limit this category to cases that do not fall within any existing rule of law or equity. I see no vital objection to this change although I think it is likely to produce some confusion in practice, especially in cases where it is not clear whether rules of law or equity are applicable to the sovereign, but where it is entirely clear that the Indians were defrauded.

7. Justice suggests a complete rewriting of the paragraph beginning on line 24 of page 2 and ending on line 3 of page 3. Apparently the purpose of the revision is to meet the suggestion originally made by the Bureau of the Budget to the effect that claims which have heretofore

been adjudicated or settled should not be presented to the Commission. In principle, representatives of this Department agreed on this point at our March 19 conference. The language that Justice now proposes, however, appears to go beyond the necessities of the case. A preferable way of dealing with this situation would be to adopt the language suggested in the original Justice Department report of June 25, 1945, on the Indian Claims Commission Bill. The addition to this paragraph that was then suggested by Justice was "but no claim that has been heretofore adjudicated or settled may be presented to the Commission unless it be presented as a moral claim." If this language is to be used in the present bill, which has dropped the words, "moral claim" it should be adjusted to read: "but no claim that has been heretofore adjudicated or settled may be presented to the Commission unless it be presented under Clause 6 of the first paragraph of this section (or Clause 5, if Justice amendment No. 5 is adopted).

8. Justice recommends the deletion of the clause authorizing the Commission to pass upon the justification of various proposed offsets. This recommendation lumps together gratuities paid before any cause of action arose and those paid subsequently, lumps together expenditures made by virtue of treaty or other obligations and expenditures amounting to gratuities, and generally breaks down all the lines of division which have been used by the Court of Claims and might be used by the Claims Commission to distinguish between payments that ought and those that ought not to be used as offsets against Indian claims. Such a provision would run directly counter to the main purpose of the present bill, as set forth in the House Committee report, namely the purpose of "abolishing the last serious discrimination with which they (Indians) are burdened in their dealings

with the Federal Government * * * by giving them a full and untrammeled right to have their grievances heard under non-discriminatory conditions." No *non-Indian* suing on the basis of a Federal contract or agreement with the United States is compelled to deduct sums gratuitously expended by the Federal Government for his education, social security, hospitalization, etc. The Budget Bureau suggested that the provision of H.R. 4497 (Sec. 2, page 3, lines 7-23) limiting the application of gratuities as offsets to non-legal claims be modified and that the propriety of applying offsets should be left to the determination of the Commission in all instances. It is my understanding that this suggestion of the Budget Bureau was agreed to by all concerned as a fair and reasonable compromise at our March 19 conference.

9. Justice suggests the elimination of the sentence beginning at the end of line 23 on page 3 and ending on line 6 of page 4. This is in accordance with the suggestion of the Budget Bureau, which was *agreed to* by all concerned at our conference on March 19.

Section 10.

10. Justice suggests inserting the qualifications "duly authorized" before "member" in line 21 on page 6 and "American" before "Indians", in line 22. Neither amendment appears to be particularly objectionable, useful, or important.

Section 11.

11. Justice suggests that the provision allowing transfers of suits be completely reversed and that all transfers be barred, not only of suits now pending but of suits yet to be brought under existing legislation. This means that a tribe that has obtained a jurisdictional act less favorable in its terms than H.R. 4497 is to be placed at a permanent disadvantage as compared with tribes which have not

succeeded in securing jurisdictional acts. This seems manifestly unfair. Furthermore, it tends to defeat the main purpose of the Indian Claims Bill by making it necessary for tribes thus excluded from the jurisdiction of the Claims Commission to go back to Congress for amendments of existing jurisdictional acts, if, in the couse of litigation, it develops that their jurisdictional acts are not broad enough to permit a hearing on the merits of existing claims. Since the Justice Department has been quite successful in many recent cases in discovering defects of statutory draftsmanship which prevented the Court of Claims from passing on the merits of the claims that Congress intended to have adjudicated, and in all such cases the only recourse of the tribe seeking a judgment on the merits is to go back to Congress for amendments of the original jurisdictional act, this amendment would perpetuate one of the most wasteful aspects of the present Indian claims business. Apart from the question of job security for those employees of Justice, Interior, and the General Accounting Office, (not to mention Congress and the courts), who now pour their efforts into the bottomless sieve of adjudications that do not get to the merits of a claim and call only for more legislation and more adjudication, this amendment would, I believe, suffice to insure the defeat of any bill to which it was attached.

At our conference of March 19 we considered the alternative suggestion of the Bureau of the Budget with respect to this section, namely, that the right of removal granted to plaintiffs be extended equally to defendants, and we agreed that this was a reasonable provision.

Section 13.

12. Justice suggests elimination of Section 13(b), which provides for the establishment of an Investigation Division. Such a Division appears to be essential not only

to the efficient functioning of the Commission but also to the achievement of the main objective of the Indian Claims Bill, the bringing to an end of Indian claims litigation. Unless an Investigation Division is available to do a thorough job of uncovering the facts in these cases, which the Indians' attorneys seldom do, there can be no assurance that the Commission will have completed the job for which it was established when it comes to the end of its term.

Section 14.

13. Justice suggests, in line with the suggestion originally made by the Bureau of the Budget, and *agreed to* by representatives of the Interior Department on March 19, that Section 14 be recast to follow the original language of the bill as first introduced, allowing the head of any Department to refuse to supply information or papers where such action would be in his opinion injurious to the public interest. It should be noted that the House Committee on Indian Affairs gave considerable thought to this issue and was unanimous, I believe, in its decision to exclude this language. From the standpoint of this Department, however, the language in question is not seriously objectionable.

14. Justice suggests eliminating references to "the trial of any suit or proceeding instituted hereunder" (page 9, lines 10, 22-23). Apparently the purpose is to deny the judicial character of the Commission. This, while merely a matter of terminology, would appear to be a mistake, since it appears to the advantage of all concerned that the Commission should follow judicial rather than legislative or executive procedures and forms.

Section 15.

15. Justice suggests language at line 8 of page 11 which is designed to cut down the finality of any compromise to which the Attorney General, the Indians, and the Commission might agree, by specifying that any such compromise should merely "have the effect of a recommendation of the parties". The parties concerned can make a recommendation to Congress at the present time without having an Indian Claims Commission or a jurisdictional bill or a hearing. It would seem a waste of time to go through all these extra steps if the total result is merely a recommendation which requires special legislation to bring about its effectuation. This would make the Indian Claims Commission procedure not an aid in securing final settlement of Indian claims controversies but rather a source of additional and unnecessary obstacles to final settlement. It is particularly difficult to see why such language should be inserted in H.R. 4497, since the Attorney General will not be under any compulsion to enter into any such compromise as might amount to a final adjudication. Apparently Justice is asking Congress to prevent any future Attorney General from entering into such a compromise as was reached in the California litigation, – but for which settlement attorneys might be litigating this case for many decades to come, with no profit to the Indians.

Sections 17, 19 (new).

16. Justice suggests an amendment to Section 17 and a new Section 19 to require the issuance of interlocutory orders in all cases. This procedure may be highly advisable in most cases, in economizing the effort of the Commission and the parties before the Commission, but it is the sort of thing that ought to be left to the Commission to work out by rule of Court, as the Court of Claims has

done. Otherwise every peculiar case that requires a modification of this procedure will require that the Commission appeal to Congress for modification of the law under which it functions.

Sections 20, 21 (new)

17. The new Sections 20 and 21, suggested now for the first time by the Department of Justice, destroy the last vestiges of finality that might attach to any decision of the Commission. In effect the Commission is reduced to a body which makes recommendations on half a dozen different points, to which all interested parties are entitled to add their respective dissents, whereupon the whole mess is presumably tied up with a red ribbon and shipped to Congress, which can then begin to hold hearings and legislate on the subject with a view to resolving the differences of opinion that this procedure is designed to evoke. In practical effect, this means that payment of Indian claims would be dependent upon the operations of the consent calendar. This is now precisely the situation which H.R. 4497 is designed to remedy. Instead of remedying this situation, the bill, with the suggested amendment, would only render more difficult the task of the Indians and of the Congressional Committee in bringing about a final settlement of any claim.

Section 20 (Old)

18. Justice suggests the elimination of the words "either party, whether" in line 17 of page 14. This amendment would seem to be unobjectionable, useless, and unimportant.

19. The same may be said of the suggested deletion in line 22 of page 13 of the words "60 days after" and the

substitution of "30 days or such further time as the Commission may allow in the particular case * * *."

20. The same may be said of other verbal changes made in the last sentence of Section 20 (original number) (b).

21. Justice suggests the elimination of subsection (c) (page 14, lines 7 to 11), allowing for review by the Supreme Court of determinations of questions of law by the Court of Claims. Removal of the possibility of Supreme Court review would undoubtedly be highly offensive to the Indians and probably to the Members of Congress interested in this legislation. Personally I am not sure but that it might be an advantage to the Indians if the Supreme Court were excluded from participation in these cases. I am entirely clear, however, that the effort to exclude the Supreme Court from the scope of this legislation would have an adverse effect upon the chances for its enactment. There may, of course, as the Department of Justice anticipates, be some cases where the Supreme Court would decline to review a Court of Claims decision on the ground that the decision did not arise in a case at "law or equity", I see no reason, however, to anticipate that all cases before the proposed Commission would be of this character. I am satisfied that the Supreme Court can be expected to review or refuse to review Court of Claims decisions in accordance with its own view of the law, without such assistance as the Department of Justice here suggests.

Section 22 (old number)

22. Justice suggests the complete deletion of Section 22 which lays the basis for handling decisions of the Claims Commission in the same manner as Court of Claims decisions are now handled, i.e., by inclusion in

Congressional appropriation acts. The issues involved in this suggestion have been discussed above under Points 15 and 17.

Section 24 (old number)

23. Justice suggests the complete elimination of the section which provides that hereafter Indians shall be on the same basis with other citizens of the United States in going before the Court of Claims for the adjudication of future violations of Federal contracts or agreements. This section is designed, as pointed out by the House Committee report, to eliminate "a lingering discrimination, which arose at a time when Indians were not citizens and were commonly regarded as a hostile and inferior people" (Report, p. 2). To eliminate this section would be to endorse the perpetuation of this discrimination. Furthermore, eliminating this section would make impossible any final solution of the Indian claims problem. Since the proposed Commission is limited in its jurisdiction to hearing claims in existence at the time of the enactment of this legislation, new claims commissions or new jurisdictional acts would be required for all claims arising in the future, if Indians remain barred from the forums available to their fellow citizens. Since it is a very difficult matter to determine whether a case on the basis of a series of complicated transactions "arose" before or after 1946, and correspondingly easy for Indian attorneys to contend that a continuing wrong had not been consummated in 1946, this particular suggestion of the Department of Justice would be productive of much confusion, litigation and legislation for the future.

Supreme Court, U. S.
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No. 79-1103

In the Supreme Court of the United States

OCTOBER TERM, 1979

THE MENOMINEE TRIBE OF INDIANS, ET AL., PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Claims (Pet. App. 1a-19a) is reported at 607 F. 2d 1335. The opinion of the Trial Judge (Pet. App. 20a-54a) is not reported.

JURISDICTION

The judgment of the Court of Claims was entered on October 17, 1979. The petition for a writ of certiorari was filed on January 15, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the Court of Claims has jurisdiction under 28 U.S.C. 1491 and 1505 to determine if the United States is liable in damages because Congress enacted a concededly

constitutional statute terminating federal supervision of the Menominee Tribe, allegedly in breach of the fiduciary duty owed by the United States to the Tribe.

STATEMENT

This is an action by the Menominee Tribe of Indians and certain of its members and represenatives to recover damages for injuries alleged to have resulted from enactment by Congress of the Menominee Termination Act of 1954, 25 U.S.C. (1970 ed.) 891 *et seq.* (Pet. App. 128a-135a). The background of the Termination Act is described in this Court's opinion in *Menominee Tribe* v. *United States*, 391 U.S. 404, 408-410 (1967).

1. The Menominee Tribe was granted a reservation in 1854 by the Treaty of Wolf River, 10 Stat. 1064 (Pet. App. 136a-140a), under which the Tribe also retroceded certain lands it had acquired under an earlier treaty.

A century later, in 1954, implementing its then-current policy, Congress enacted the Menominee Termination Act, providing a general procedure and timetable for termination of federal supervision of the Menominee Tribe. Under the Act, the Tribe was to formulate a plan for future control of tribal property and service functions theretofore conducted by the United States. On or before April 30, 1961, the Secretary was to transfer to a tribal corporation or to a trustee chosen by him all property held in trust by the United States. The Termination Act further provided that after transfer to the Tribe of title to property previously held in trust by the United States, tribal members were not to be entitled to special services performed by the United States for Indians and that all statutes specifically affecting Indians would no longer be applicable to the Tribe. The Act was duly carried out. See *Menominee Tribe* v. *United States, supra*, 391 U.S. at 408-409.

2. Dissatisfied with Congress' termination decision and its results, the Tribe (together with certain of its representatives and its members) filed the present action in April, 1967, in the Court of Claims under 28 U.S.C. 1491 and 1505. The central thrust of the claim is that passage and implementation of the Act terminating federal supervision of the Tribe and its property constituted a breach of trust owed by the United States to the Menominees.[1]

On July 19, 1978, the Trial Judge filed an opinion and findings of fact on the question of liability, without determining damages (Pet. App. 20a-124a). In the opinion and findings, the Trial Judge concluded that the Menominee Termination Act was not in the petitioners' best interest, was ill-advised, and had a "disastrous" effect upon their assets and way of life. The Trial Judge further found that the termination decision made by Congress in passing the Act was not warranted by criteria for termination previously suggested by the Acting Commissioner of Indian Affairs in 1947, that the Tribe and its members did not consent to termination, that the United States failed adequately to assist the Menominees to prepare for termination, that "no reappraisal of the policy of termination" was made when it appeared the Menominees were not prepared for it, and that a period of one to two generations of phased withdrawal of federal supervision would have been a more appropriate method of termination (Pet. App. 61a-62a, 123a-124a). For these reasons, the Trial Judge concluded that enactment of the Menominee Termination Act constituted a breach of Congress' fiduciary obligation to petitioners (Pet. App. 51a-54a).

---

[1]Petitioners also alleged that certain actions taken in implementing the termination constituted a taking of property without just compensation, in violation of the Fifth Amendment (Pet. App. 3a). These constitutional claims remain open on remand to the Trial Judge, and are not involved in the instant petition (see page 6, *infra*).

3. In its en banc review of the Trial Judge's decision, the Court of Claims did not reach the question whether there had been a breach of duty, imposed by statute or treaty, in terminating federal supervision of the Menominee Tribe (Pet. App. 5a). Instead, the court unanimously held that Congress, in enacting 28 U.S.C. 1491 and 1505, "has not consented to suit by Indians in this court on non-constitutional claims for breach of trust based directly on the passage and enactment by Congress of legislation it considers appropriate but which the claimant deems a violation of a fiduciary obligation" (Pet. App. 5a). The court noted that the Trial Judge had "assumed without discussion that there was jurisdiction over all Indian claims for breach of trust, of whatever character, and made absolutely no distinction * * * between the actions of Congress setting policy and directing conduct and the conduct of executive officials contrary to Congressional policy and directives" (*id.* at 5a n.5). The Court of Claims concluded, however, that the controlling jurisdictional statutes did not give it "authority to entertain a suit contending that a statute passed by Congress, though valid and constitutional, is nevertheless a breach of trust owed by the Federal Government to the Indians" (*id.* at 5a).

Looking first to the Tucker Act, 28 U.S.C. 1491,[2] the Court of Claims reasoned that petitioners' claim was not "founded" upon an Act of Congress, because the Termination Act was cited as the *breach*, not the *source* of its rights. Nor, in the court's view, could the claim be

[2]28 U.S.C. 1491 provides in pertinent part:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

"founded" upon "any regulation of an executive department," because any prior regulation would have been displaced by the Termination Act. Further, the court reasoned that even if the early treaties upon which petitioners relied could possibly be deemed an "express or implied contract with the United States," these treaties could not form the basis of a claim against the United States because they had been subsequently modified or displaced by a valid Act of Congress—the Termination Act. For the same reason, the court could not find the requisite consent to suit here for "liquidated or unliquidated damages in cases not sounding in tort" (Pet. App. 9a).

In the court's view, its conclusions regarding the scope of 28 U.S.C. 1491 applied equally to 28 U.S.C. 1505,[3] "which substantially tracks section 1491 and has been construed to cover the full ground of the latter" (Pet. App. 9a). Ultimately, the Court of Claims held that it did not have jurisdiction over claims based on Congress' passage of the Termination Act or the Interior Department's implementation of it, so far as its officials faithfully carried out the congressional mandate. To the extent that Interior officials may have *violated* any requirement of the Termination Act (or some other statute), these matters were left to further

[3]28 U.S.C. 1505 provides:

> The Court of Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive Orders of the President, or is one which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band or group.

proceedings before the Trial Judge on remand,[4] along with any claims based on the Constitution (Pet. App. 18a).

ARGUMENT

The issue tendered in this case is one of first impression, as petitioners stress (Pet. 19-20; see, also, Pet. App. 7a). Had it been decided the other way, its importance could not be gainsaid; in that event, we should most certainly have sought review here. But it hardly follows that the present petition for certiorari should be granted. The Court cannot entertain every novel contention which, if successful, would have significant consequences: the argument must also have colorable merit. In our view, this is one of those instances in which the decision below—reached by a unanimous Court of Claims sitting en banc, in a well-reasoned and thorough opinion—is so plainly correct that it properly may be left unreviewed.

1. The proposition advanced by petitioners is truly startling: that, by a permanent general statute enacted in 1946, the Congress bound itself henceforth to pay damages to any Indian Tribe whenever, in the future, its own legislation affecting the Tribe could be found not to have served the Tribe's best interests, albeit no taking of property without just compensation or other unconstitutional action occurred, and notwithstanding the legislation complained of obviously contemplated no such payments. The case is wholly unlike *United States* v. *Sioux Nation*, cert. granted, No. 79-639 (Dec. 10, 1979), in which the claim is that the *Constitution* requires an award to compensate for a congressional taking. Nor do we deal with a situation like that presented in *United*

[4]Whether or not such claims are open may depend on this Court's decision in *United States* v. *Mitchell*, No. 78-1756. But that question is not before this Court on the present petition.

States v. *Mitchell*, No. 78-1756 (argued Dec. 3, 1979), where the complaint is that Executive officials *violated statutory* commands. And, finally, the present claim bears no resemblance to that made in *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968), involving a dispute about the effect of the Termination Act.[5] Here the heart of the case is that the Termination Act itself constituted a breach of trust which entitles the Tribe to recover damages—not because the Act expressly or impliedly so provides,[6] or because the Constitution requires it, but because, it is said, Congress has, by enacting 28 U.S.C. 1505 in 1946, generally subjected the United States to liability in such circumstances.

2. To be sure, on a number of occasions, Congress has, by special jurisdictional statutes, expressly authorized recovery in respect of past injustices done a particular Tribe, sometimes by valid legislative action. See, *e.g.*, *United States* v. *Mille Lac Chippewas*, 229 U.S. 498, 509 (1913); *United States* v. *Tillamooks*, 329 U.S. 40 (1946). In 1946, by the Indian Claims Commission Act, 25 U.S.C. 70a, Congress determined to afford a like opportunity to all Tribes, but only in respect of *past* wrongs and on condition that the claim was filed in a five-year period. These are,

[5]Equally remote, of course, are cases in which implementation of an Act of Congress was sought to be enjoined on the ground that it violated the Due Process Clause of the Fifth Amendment. *E.g.*, *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903); *Delaware Tribal Business Committee* v. *Weeks*, 430 U.S. 73 (1977).

[6]Needless to say, it is perfectly clear that the Menominee Termination Act itself did not intend to subject the United States to liability in damages for "breach of trust." Indeed, in the earlier *Menominee* case, *supra*, 391 U.S. at 413, an important consideration influencing the Court's conclusion that the Act had not extinguished hunting and fishing rights was the obvious determination of the Congress to end, rather than add to, the Government's financial obligations to the Tribe.

indeed, exceptional provisions. But, precisely because the relief made available was extraordinary, the offer was carefully circumscribed. Congress recognized that all branches of government had often dealt unjustly with the Tribes in years gone by and was willing to make restitution. That, however, is a far cry from contemplating that Congress would continue to pass laws in derogation of its responsibilities to the Indians and providing, *in advance*, for monetary relief in respect of such future legislation.

Attributing such a purpose to the Congress of 1946, when 28 U.S.C. 1505 was enacted as Section 24 of the Indian Claims Commission Act, ch. 959, 60 Stat. 1055, is to posit something wholly unprecedented and highly improbable. Only the clearest declaration would justify a conclusion at once very cynical and unnaturally generous. Nothing in the 1946 Act discloses any such intent. On the contrary, the scheme of the statute and its legislative history clearly point in the opposite direction.

3. In *United States* v. *Testan*, 424 U.S. 392, 398 (1976), the Court held that 28 U.S.C. 1491 does "not create any substantive right enforceable against the United States for money damages." Petitioners do not contend otherwise and, in fact, largely abandon reliance on 28 U.S.C. 1491 as a basis for jurisdiction here.[7] Rather, petitioners essentially argue that 28 U.S.C. 1505 is cast more broadly than 28 U.S.C. 1491 and that it is this broader reach that covers their claims (see, *e.g.*, Pet. 11-12). But the structure and legislative history of the Indian Claims Commission Act, which is the source of Section 1505, demonstrate that the provision now invoked was intended to have the same coverage of

[7]Petitioners do refer to 28 U.S.C. 1491 in the question presented (Pet. 2), but in their discussion of the reasons for granting the writ (Pet. 11-20), they rely exclusively on the argument that the court below erroneously interpreted 28 U.S.C. 1505.

claims by Indian Tribes as does 28 U.S.C. 1491 with respect to claims by non-Indians.

The Indian Claims Commission Act implemented a dual approach to the determination of Indian claims. For claims arising prior to the effective date of the Act (August 13, 1946), the Indian Claims Commission was authorized to "hear and determine" claims against the United States based on legal and equitable principles and on consideration of "fair and honorable dealings that are not recognized by any existing rule of law or equity." 25 U.S.C. 70a. Congress intended to place tribal claimants in a preferential position by authorizing determination of these historical claims based on moral, as well as legal, obligations. For claims arising after that date, however, a distinct provision was enacted, now Section 1505. While sovereign immunity is waived in respect of tribal claims, there is here no hint that the United States is made liable on theories "not recognized by any existing rule of law or equity." Plainly, the scheme of the Act is to confine claims so based to the past and provide relief for the future on traditional legal grounds alone.

The enactment of separate provisions for past and future wrongs, and the contrast in the language of the two texts, sufficiently reveal the limited scope of Section 1505. But any doubt on this score is erased when we notice the legislative history of the latter section. Congress made clear its intent, for alleged wrongs arising after 1946, to place tribal claimants on an equal footing with persons seeking recovery under 28 U.S.C. 1491:

> As respects claims accruing after its adoption this bill confers jurisdiction on the Court of Claims to determine and adjudicate any tribal claim of a character which would be cognizable in the Court of Claims if the claimant were not an Indian tribe. In such cases the claimants are to be entitled to recover in the

> same manner, to the same extent, and subject to the same conditions and limitations, and the United States shall be entitled to the same defenses, both at law and in equity, * * * as in cases brought in the Court of Claims by non-Indians under Section 145 of the Judicial Code (36 Stat. 1136, 28 U.S.C. 250) [now 28 U.S.C. 1491], as amended.

H.R. Rep. No. 1466, 79th Cong., 1st Sess. 13 (1945). See also *Creation of Indian Claims Commission: Hearings on H.R. 1198 and H.R. 1341 Before the House Comm. on Indian Affairs*, 79th Cong., 1st Sess. 149 (1945) (Assistant Solicitor Cohen); *Klamath and Modoc Tribes* v. *United States*, 174 Ct. Cl. 483, 489-490 (1966).

Because, with respect to post-1946 claims, 28 U.S.C. 1505 merely parallels the jurisdictional grant in 28 U.S.C. 1491 for claims that "would be cognizable in the Court of Claims if the claimant were not an Indian tribe" (H.R. Rep. No. 1466, *supra*, at 13), and because the United States is entitled to the same defenses, both at law and in equity, under 28 U.S.C. 1505 as under 28 U.S.C. 1491 (*ibid.*), the conclusion that 28 U.S.C. 1491 "[did] not create any substantive right enforceable against the United States for money damages" (*United States* v. *Testan*, *supra*, 424 U.S. at 398) is equally applicable to the grant of jurisdiction in 28 U.S.C. 1505. The right to recover on a non-constitutional and non-contractual claim based on a "law * * * of the United States" under 28 U.S.C. 1505—as for claims based on an "Act of Congress" under 28 U.S.C. 1491—must therefore be premised on the existence of a substantive right to money damages under some other statute. See *United States* v. *Testan*, *supra*, 424 U.S. at 398-400.[8]

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[8]Petitioners rely (Pet. 11-12) on a passage in the House Report on the Indian Claims Commission Act stating that 28 U.S.C. 1505 was intended to confer jurisdiction over "any controversy with the Federal Government that may arise in the future" (H.R. Rep. No. 1466, *supra*, at 3) as an indication that the Court of Claims has jurisdiction over their claims here under Section 1505. This reliance is misplaced: the sentence in the House Report quoted by petitioner (Pet. 11) states that "the Indian would henceforth have the same right as his white or black neighbor to secure a full and free hearing * * * on any controversy with the Federal Government that may arise in the future." Thus, the passage relied upon by petitioners supports our position that an Indian Tribe pressing a claim under 28 U.S.C. 1505, like any other claimant seeking money damages in the Court of Claims, must point to some other statute creating the right to recover damages.

As noted above (see note 6, *supra*), it is clear that the Menominee Termination Act, which was enacted for the very purpose of removing federal supervison over petitioners and their property, was not intended to create such a right to money damages against the United States merely because the statutory policy of termination was carried into effect. The congressional judgment to terminate federal supervision over the Menominees may have been unwise, as petitioners assert and as Congress itself evidently concluded in 1973 when it enacted the Menominee Restoration Act, (Pub. L. No. 93-197, 87 Stat. 770, 25 U.S.C. 903) reversing its earlier termination decision. But it does not follow that Congress has consented to suit by petitioners on a claim that is premised on nothing more than a dissatisfaction with the manner in which Congress, in enacting the Menominee Termination Act, exercised its plenary power over Indian affairs within the constitutional range of options then available to it.[9] This Court has stated that the decision when to terminate federal supervision over an Indian Tribe is a political one for the Congress. *United States* v. *Waller*, 243 U.S. 452, 459-460 (1917); *United States* v. *Nice*, 241 U.S. 591, 598 (1916); *United States* v. *Sandoval*, 231 U.S. 28, 46 (1913). It would be extraordinary to

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[9]As noted above, claims arising under the Constitution are open for consideration on remand to the Trial Judge (see page 6, *supra*).

conclude that Congress, either in 28 U.S.C. 1505 or the Termination Act itself, consented to the payment of damages if a court should disagree with its political judgment in making a termination decision.

Petitioners also argue (Pet. 11-13) that enactment of the Termination Act was inconsistent with prior treaties and a general fiduciary duty they assert Congress owed to them. But, as the Court of Claims observed, this Court has made clear "that Congress has the unilateral and plenary power (to the extent there is no violation of the Constitution, including the Just Compensation Clause) to abrogate a prior treaty with Indians" (Pet. App. 10a, citing *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903); *Choate* v. *Trapp*, 224 U.S. 665, 670-671 (1912); *Shoshone Tribe* v. *United States*, 299 U.S. 476, 497 (1937); *Delaware Tribal Business Committee* v. *Weeks*, 430 U.S. 73, 84 (1977); *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 587-588, 594, 598 (1977)). Accordingly, there can be no basis for inferring that Congress has consented to a suit for damages whenever a court might conclude that Congress was unwise in exercising its "unilateral and plenary" power to supplant the terms of a treaty through subsequent legislation. A claim premised on a validly supplanted treaty does not "arise[ ] under" a treaty within the meaning of 28 U.S.C. 1505, because whatever rights may have existed thereunder—even assuming they included a right to money damages for a violation—would not survive the valid abrogating statute. Nor is there any basis for inferring that Congress has consented to suit based on a claim that a valid Act of Congress is in violation of some undefined fiduciary duty thought to be owed to an Indian tribe outside of the context of a particular statute or treaty.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1103

THE MENOMINEE TRIBE OF INDIANS, *et al.*,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

BRIEF OF *AMICUS CURIAE* NATIONAL CONGRESS OF AMERICAN INDIANS, INC. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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This *amicus curiae* brief is filed by the National Congress of American Indians, Inc. with the consent of both parties.

INTEREST OF *AMICUS CURIAE*

The National Congress of American Indians, Inc. (NCAI), is a nonprofit association of 146 Indian tribes

located throughout the United States. It was founded in 1954 in Oklahoma and maintains its national headquarters in Washington, D.C. NCAI represents the interests of a wide variety of Indians and Indian tribes, including most of the major tribes in the country.

NCAI and its member tribes will be significantly and adversely impacted by the Court of Claims' decision in this case that it has no jurisdiction to hear nonconstitutional breach of trust claims resulting from abrogation of treaty rights and the federal trust obligations to Indian tribes where Congress rather than the Secretary of the Interior is responsible for the breach. NCAI member tribes have treaties and/or other agreements with the United States which guarantee the tribes certain fundamental rights, including, but not limited to, the right to exist as quasi-sovereign nations with powers of self-government under the guardianship and protection of the United States government. The trust responsibility assumed by the United States under these treaties constituted valuable consideration given in exchange for lands desired by the United States under the dominion and control of Indian tribes, and other concessions made by Indian tribes to agree to these treaties. The Court of Claims' decision in this case will allow Congress to abrogate treaty rights and trust responsibilities without incurring any liability whatsoever for the resulting harms. These Indian tribes have no other legal forum to prosecute their claims for such wrongdoings. As a result, the treaties and agreements made with NCAI members, and the fiduciary duties arising under them, lose their status as legally enforceable obligations and instead become gratuitous promises which Congress may alter at will.

The Court of Claims' decision in this case fundamentally alters the relationship between the United States and the Indian tribes, allows Congress to curtail or eliminate that responsibility at will, and severely limits the ability of tribes to hold the United States accountable for the mismanagement of Indian property and affairs. For these reasons, NCAI urges that the Supreme Court issue a writ of certiorari and reverse the decision of the Court of Claims.

ARGUMENT

I.

THE DECISION BELOW ALLOWS CONGRESS TO ABROGATE VESTED TREATY RIGHTS AND FEDERAL TRUST OBLIGATIONS WITHOUT RISK OF LIABILITY.

This case concerns the right of Indian tribes to recover for breaches by Congress of the fiduciary obligations assumed by the United States under sacred treaties with Indian tribes which, although resulting in monetary damages, do not violate constitutional provisions.[1] The Court of Claims concluded that under 28 U.S.C. §§ 1491 and 1505, its jurisdiction over Indian claims was limited to claims which alleged a violation of either a constitutional provision or an act of Congress.[2] Claims for

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[1]Although the specific issue before the Court of Claims was whether the United States was liable for breach of trust for terminating the Menominee Indian Tribe when such termination was directly opposed by the Tribe and contrary to their best interests, the Court of Claims, in holding that it had no jurisdiction to hear the Menominees' claim, broadened its ruling to include all congressional nonconstitutional breach of trust claims.

[2]The Court of Claims has laid down the requirements necessary to assert a claim for breach of statutory duty in *Mitchell v. United States*, 219 Ct. Cl. ___, 519 F.2d 1300, *cert. granted*, 99 S. Ct. 2880 (1979).

congressional violation of treaty and trust obligations which did not reach constitutional dimensions were determined to be outside the court's jurisdiction.

Although the specific issue before the Court of Claims was whether Congress breached its fiduciary duty to the Menominee Indians by terminating their federal status as Indians against their will and contrary to their best interests, the ramifications of that decision are much broader. By deciding that it had no jurisdiction to hear claims of nonconstitutional breaches of trust by Congress, the Court of Claims in fact made a substantive determination that Congress may abrogate or modify treaty rights and trust responsibilities without risk of liability for damages sustained by Indians as a result of such actions. Without risk of liability, the United States has no incentive to fulfill its fiduciary obligations, and should Congress decide for any reason that it is no longer desirable to live up to those obligations, it may simply eliminate them, without cost, irrespective of the severity of damages suffered by the tribes. This decision thus gives Congress a power, not heretofore recognized, to abrogate vested treaty rights. It also fundamentally alters the trust relationship between the United States and Indian tribes, for the United States will have no incentive to carry out its fiduciary duties, and the tribes will have difficulty holding the United States accountable for the mismanagement of their affairs.

II.

THE DECISION BELOW IS CONTRARY TO ESTABLISHED CASE LAW.

The Court of Claims correctly states that Congress has plenary power over Indians, and may legislate in matters concerning their affairs. *Lone Wolf v. Hitchcock,* 187

U.S. 553 (1903). NCAI admits that that power includes the authority to abrogate or modify treaties. *Lone Wolf v. Hitchcock,* 187 U.S. 553 (1903); *Choate v. Trapp,* 224 U.S. 665 (1912); *Shoshone Tribe v. United States,* 229 U.S. 476 (1937); *Delaware Tribal Business Comm. v. Weeks,* 430 U.S. 73 (1977). What the Court of Claims failed to realize, however, is a point long recognized by the Supreme Court—that the power to abrogate treaties does not encompass the authority to destroy the vested rights created by those treaties, *Choate v. Trapp,* 224 U.S. 665 (1912), and the United States is liable for damages when Congress passes an act eliminating such rights. *Menominee Tribe v. United States,* 391 U.S. 404, 413 (1968). The Court of Claims, by holding that it has no jurisdiction to hear a claim that Congress violated treaty obligations, is reversing this rule of law. If Indian tribes have no forum in which to assert a claim for damages suffered for the abrogation of their treaty rights by Congress, then they in effect have no rights at all,[3] and the prior pronouncements of the Supreme Court that Congress may not abrogate treaty rights without compensation are nullified.[4]

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[3]If the tribes have no remedy in the Court of Claims, then they have no forum in which their claims may be heard, for assuming, as the Court of Claims did, that an act of Congress is validly enacted and constitutionally permissible, the tribes have no basis for challenging the law in the federal court system. Moreover, as the Court of Claims correctly notes in *Mitchell v. United States,* 219 Ct. Cl. ___, 591 F.2d 1300, 1303 (1979), such prospective judicial relief as injunctions or mandamus, even when available, are meaningless for damages already incurred.

[4]NCAI recognizes that the Court of Claims realizes that to the extent the abrogation of treaty rights is a Fifth Amendment taking, the United States would be liable, irrespective of whether

[footnote continued]

The Court of Claims also failed to recognize that the Supreme Court has held that Congress' power to legislate Indian affairs is subject to the restraints inherent in the fiduciary obligations established by Indian treaties, *United States v. Creek Nation,* 295 U.S. 103, 109-110 (1935); *Delaware Tribal Business Comm. v. Weeks,* 430 U.S. 73 (1977); *Three Affiliated Tribes of the Fort Berthold Reservation v. United States,* 182 Ct. Cl. 543, 390 F.2d 686 (1968). Unlike the Court of Claims' rationale in this case, these limitations on congressional power are not simply *moral* constraints, but rather *legal* restrictions. As then President Nixon stated in his July 8, 1970 Message on American Indians rejecting the previous congressional policy of forced termination:

> *Termination implies that the Federal Government has taken on a trusteeship responsibility for Indian Communities as an act of generosity towards a disadvantaged people and that it can therefore discontinue this responsibility on a unilateral basis whenever it sees fit. But the unique status of Indian tribes does not rest on any premises such as this.* The special relationship between Indians and the Federal government is the result of solemn obligations which have been entered into by the United States government. Down through the years, through written treaties and through formal and informal agreements, our government has made specific commitments to the Indian people. For their part, the Indians have often surrendered claims to vast tracts of land and have accepted life

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the actions were by Congress or the Executive Department. In many instances, however, the abrogation of treaty rights may encompass the elimination of rights which do not fit within the strictures of formal eminent domain law, and it is these instances which concern NCAI.

> on government reservations. In exchange, the government has agreed to provide community services such as health, education and public safety, services which would presumably allow Indian communities to enjoy a standard of living comparable to that of other Americans.
>
> This goal, of course, has never been achieved. *But the special relationship between the Indian tribes and the Federal government which arises from these agreements continues to carry immense moral and legal force.* [Emphasis added.]

July 8, 1970, Message on American Indians, *reprinted in* M. Price, LAW AND THE AMERICAN INDIAN 597 (1973).

The Court of Claims, by allowing Congress to abrogate treaty rights without incurring financial liability, is adopting the position specifically rejected by President Nixon. By denying Indian tribes a forum for redress of grievances caused by the passage of a law which, as enacted, constitutes a breach of fiduciary duty, the Court of Claims emasculates the Supreme Court's requirement that legislation enacted pursuant to Congress' plenary power over Indian affairs be consistent with its fiduciary obligations. It also fundamentally alters the trust relationship between the United States and Indian tribes, for the United States will have no incentive to carry out its fiduciary duties, and the tribes will have difficulty holding the United States accountable for mismanagement of their affairs. The inevitable result will be the destruction of the legal trust relationship between the United States and Indian tribes without legal recourse.

III.

THE DECISION BELOW VIOLATES THE SPECIFIC LANGUAGE AS WELL AS THE INTENT OF THE INDIAN CLAIMS COMMISSION ACT.

The Court of Claims' decision in this case also violates the provisions of the Indian Claims Commission Act. 50 Stat. 1049 (1946). Although that Act expressly grants the Court of Claims jurisdiction to hear claims arising under treaties, 28 U.S.C. § 1505, the court concluded that it in fact did not have the power to hear claims of congressional abrogation of treaty rights. Moreover, the Act also provides that it was not intended to alter the trust relationship between the United States and the tribes. 60 Stat. 1055-56 (1946). Although ostensibly decided on jurisdictional grounds, the Court of Claims' decision in fact will significantly impact the substantive rights of Indians and profoundly alter the trust relationship, in violation of the terms and purposes of the Act. If the Court of Claims' decision is allowed to stand, Indian tribes will once again be forced to petition Congress to seek special jurisdictional acts for redress of their grievances. This clearly was not the intent of Congress in passing the Indian Claims Commission Act.

CONCLUSION

If congressional actions concerning Indian tribes are immune from judicial review, Congress will have no incentive to preserve the historic treaty obligations and trust responsibilities which exist between Indians and the United States. Although the present case involves a termination statute, the issue involved is substantially broader, and will come into play any time Congress passes an act which, although serving a valid, constitutional purpose, results in otherwise compensatory

damages suffered by an Indian tribe as a result of the abrogation of a treaty or trust obligation. As the termination policy in the 1950's clearly demonstrated, the threat of destruction of the special trust relationship creates significant apprehension among Indian tribes, causing them to avoid social, economic and political autonomy and seek increased federal dependency. If the Court of Claims' decision in this case is allowed to stand, the same result will occur again. The decision violates the provisions and purpose of the Indian Claims Commission Act, is contrary to existing case law, and will have a broad, adverse impact on Indian tribes throughout the country. NCAI therefore urges this Court to issue a writ of certiorari to review and reverse the Court of Claims' decision.

Respectfully submitted,

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